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91-137

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. _____

ROBERT AND ALICE BEARD,

Petitioners,

v.

SOUTH CAROLINA COASTAL COUNCIL, SIERRA CLUB, CHARLESTON NATURAL HISTORY SOCIETY AND SOUTH CAROLINA WILDLIFE FEDERATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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QUESTION PRESENTED

I. Whether the denial of Petitioners' Permit for a bulkhead on their beachfront property line violates the Fifth Amendment of the United States Constitution.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES 2

OPINIONS BELOW 5

JURISDICTION 5

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 6

STATEMENT 8

REASONS FOR GRANTING THE PETITION . . . 12

TABLE OF AUTHORITIES

Cites Page

Kaiser-Aetna v. United States, 444 U.S. 164 (1979) 17-19

Keystone Coal Association v. DeBenedictis, 480 U.S. 470, 479-80 . . . . . 16, 17

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 14, 17-20

Lucas v. S.C. Coastal Council, S.C. S.Ct. Slip Op. No. 23342, February 11, 1991) 16

Mugler v. Kansas, 123 U.S. 623 (1887) . . 16

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) . . . 13, 14, 17-19

Webbs Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) . . . 20

Statutes

28 U.S.C.A. §1257(a) 4

1976 South Carolina Code of Laws Section 48-39-10 et seq. 6, 10

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

No. _____

Robert Beard and Alice Beard[1], Petitioners,

vs.

South Carolina Coastal Council, Sierra Club, Charleston Natural History Society, and South Carolina Wildlife Federation, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

Robert and Alice Beard and The South Carolina Tourism Council petition for a writ of certiorari to review the judgment of the South Carolina Supreme Court in this case.

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[1]The S.C. Tourism Council is also a petitioner.

OPINIONS BELOW

The opinion of the South Carolina Supreme Court (Appendix A1 and, by the South Carolina Supreme Court's incorporation by reference in its opinion, A2, printed in the separate volumes of appendices) is reported at ___ S.C. ___, 403 S.E.2d 620 (1991). The final order of the South Carolina Supreme Court denying rehearing is not reported (See Appendix D.) The opinions of the circuit court and of the South Carolina Coastal Council are not reported. (See Appendices B and C.)

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C.A. §1257(a).

The judgment of the Court below was entered on April 17, 1991.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The South Carolina Coastal Zone Management Act [Section 48-39-10 et seq. of the 1976 S.C. Code Annotated] is set forth in Appendix E in the separate volumes of Appendices.

STATEMENT

The petitioners in this case are Robert and Alice Beard, who own four contiguous oceanfront lots in the City of North Myrtle Beach, South Carolina. Each lot is 50' by 125' and extends between the publicly owned dry sand beach adjacent to the Atlantic Ocean and Ocean Boulevard. The lots are contiguous to one another and each contains a small beach house which is available to the public for rent.

Three of the four lots have wooden bulkheads fronting the Atlantic Ocean. The bulkheads extended to a point approximately 18 1/2' and 25' landward of the oceanfront property line. The fourth lot has no bulkhead. The area on both sides of the existing bulkheads is sand with the only difference that some vegetation appears landward of the bulkheads. The ground level on both sides

of the existing bulkhead is generally the same.

On February 4, 1987 the Beards applied to the South Carolina Coastal Council for a permit to construct a new wooden bulkhead at the approximate location of their seaward property line on all four lots. The Coastal Council staff denied the permit on March 30, 1987. The Beards appealed this denial through the administrative appeals process, including a ground that the denial was an unconstitutional taking of their property under the Fifth Amendment of the U.S. Constitution. On September 2, 1988 the South Carolina Coastal Council issued its final administrative order upholding the staff's denial of the permit.

An appeal was commenced in circuit court in Horry County, South Carolina. The Beards asked the circuit court to

either issue the permit pursuant to state law or to hold that the denial of the permit constituted an unconstitutional taking of that portion of the Beards' property lying between the existing bulkheads and the proposed bulkhead, or their seaward property line in violation of the Fifth Amendment of the United States Constitution. On September 8, 1989 the circuit court ruled that the Coastal Council had the statutory authority to deny the Beards' permit, but that such denial was an unconstitutional taking without just compensation of the affected portion of the Beards' property.

The circuit court ruling that an unconstitutional taking had occurred was appealed to the South Carolina Supreme Court by the South Carolina Coastal Council. The South Carolina Supreme Court heard oral arguments on June 1, 1990 and

issued its order on March 11, 1991 reversing the circuit court and finding that no unconstitutional taking had occurred. The petition for rehearing was denied by the South Carolina Supreme Court on April 17, 1991.

The record reflects without contention that the beach area involved is accretional and not erosional. There is also no contest concerning the application of the 1977 Coastal Management Act, Section 48-39-10 et seq., 1976 South Carolina Code of Laws, as amended, and that neither the 1988 nor 1990 amendments to this Act related to beachfront management apply to this case.

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the effective granting of an easement for public use through the restriction of private property rights where there is no nexus between the denial and a legitimate state interest. The approximately 5,000 sq. ft. of real estate owned by the Beards which would be enclosed by the requested bulkhead may not be improved by the Beards or their renters in any way which would exclude the public. Only by continuous, active and vigilant physical presence could the Beards or their renters hope to exclude the beach-going public from this property. The record reflects that grandiose effort on the part of the South Carolina Coastal Council to portray this private property as being useful only as a public beach area and as having had that use for many

years. The South Carolina Supreme Court, because it fabricated a finding in the State Coastal Management Act that such bulkhead construction was a serious public harm, did not even reach the question of what use, if any, would be allowed on this 5,000 sq. ft. of the Beard's property. The South Carolina Supreme Court merely found that the property could be posted and trespassers ejected as a satisfactory means of maintaining this part of the private property to the exclusion of others. This simplistic approach effectively extinguishes the right to exclude others in the factual setting of this case. The property line here could be drawn in the shifting sand in order to give notice to the public on the beach, particularly the public on the beach area beyond this oceanfront property line all the way to the high water mark, that there

is private property between the existing bulkheads and the remainder of the dry sand area. But it is impractical to draw lines in the shifting sand and unreasonable to require a property owner to exert such vigilance to attain what the Constitution purportedly protects. Where the denial of the right to effectively exclude the public from use of one's property is not based upon or sufficiently related to a legitimate state interest, this Court has found a violation of the Fifth Amendment of the United States Constitution. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987). Where the denial results in a physical occupation by the public, an analysis of regulatory takings law is not required, for "'the character of the government action' not only is an important factor in resolving whether the action works a

taking but also is determinative." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). The denial is government action that can fairly be characterized as an invitation to the public on the adjacent beach to cross the invisible property line and to use the indistinguishable private area as a public area. Without compensation, and particularly without a reasonable relationship between the government action and a legitimate state interest, a taking under the Fifth Amendment has occurred. The South Carolina Supreme Court failed to apply Nollan, 483 U.S. 825 (1987), and mistakenly found that no taking had occurred in this case.

There is no relation between the denial of the permit and any legitimate state interest under the Coastal Management Act. Contrary to the South

Carolina Supreme Court's statements, the proposed bulkhead cannot be characterized as creating any harm. The beach is accreting in this area, which fact nullifies any argument that the bulkhead could cause increased scouring or otherwise exacerbate a continuing erosion problem. The South Carolina Supreme Court erroneously concluded that a mere failure to challenge the legislative findings and policies of the 1977 Coastal Management Act, a review of which fails to disclose any statements alluding to bulkheads or serious public harm, is a concession that the protection of the coastal environment is a legitimate state interest and that regulation of the property is necessary to protect against serious public harm. Petitioner does not contest that protection of the coastal environment is a legitimate state interest nor that

prevention of serious public harm may be accomplished by regulation under certain circumstances. In this case, however, these statements are irrelevant because there is no serious public harm caused by the proposed bulkhead in fact nor any claim to that effect in the law. While this Motion may be applicable to the Lucas case (Lucas v. S.C. Coastal Council, S.C. S.Ct. Slip Op. No. 23342, February 11, 1991), cited in the Beard opinion, it is not applicable here.

Petitioners acknowledge that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." Keystone Coal Association v. DeBenedictis, 480 U.S. 470, 479-80, (quoting Mugler v. Kansas, 123 U.S. 623, at 665 (1887)). In this case, where no injury is exposed in the record except for

the very issue on appeal, that being the threat of ending the public's use of this private property, Keystone's analysis need not be applied. The diminution of value question need not be reached because no legitimate state interest supports the denial of the bulkhead and the physical invasion of the public on this particular private property has effectively removed it from Petitioners' meaningful possession under our constitution. Nollan, 483 U.S. 825 (1987); Loretto, 458 U.S. 419 (1982); Kaiser-Aetna, 444 U.S. 164 (1979).

The fact that this case involves the physical invasion and occupation of private property by the public because of state action as well as a lack of sufficient nexus between the state action creating the physical invasion and a legitimate state interest provides this Court with a unique opportunity to further

clarify the private property rights protected by the Fifth Amendment of the United States Constitution and the threshold upon which state action must stop to avoid becoming unconstitutional. In Kaiser-Aetna v. United States, 444 U.S. 164 (1979); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); and Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), this Court has expressed principles that are at odds with the holding of the South Carolina Supreme Court in this case. This Court has suggested that a permanent physical occupation would never be exempt from the Takings Clause, see Loretto, 458 U.S. at 432, and that "the right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property." Nollan, 483 U.S. at 831 (citing Loretto, 458 U.s. at

433; Kaiser-Aetna v. United States, 444 U.S. 164, 176 (1979). This Court's holding that a taking is found to the extent of the occupation, "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner", Nollan, 483U.S. at 831-32 at 686, (citing Loretto, 458 U.S. 419, 434-35 (1982) (emphasis added)), must be applied in this case along with the holding that denying an activity would be constitutional if it accomplished a legitimate state interest. Nollan, 483 U.S. at 689. Here, where there is no nexus between the legitimate state interest of protecting the coastal environment and the denial of the permit, and where the denial results in a physical invasion by the public because of the impossibility of excluding others, the use by the public of this private land is an

ill-gotten benefit for which the owners must be compensated. "A State, by ipse dixit, may not transform private property into public property without compensation." Loretto, 458 U.S. at 439, (citing Webbs Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980)).

In summary, even if this Court disagreed that the prohibition of constructing the bulkhead on the property line creates a physical invasion by the public of petitioner's property, this Court should find that a taking has occurred because there is no rational relationship between the prohibition of the construction of the bulkhead at this location and the acknowledged legitimate state interest of protecting the coastal environment. Because the bulkhead would be constructed on a beach which is accreting, and not eroding, the only

negative impact found in the record for the proposed bulkhead would be to reduce the area used by the public adjacent to the Atlantic Ocean for recreation. The South Carolina Supreme Court found that such public use of this private property was not a taking. This decision is at odds with the decisions of this Court which require something more than the fabrication of "serious public harm" in order to damage private property rights.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1991

No.

ROBERT AND ALICE BEARD,

Petitioners,

v.

SOUTH CAROLINA COASTAL COUNCIL, SIERRA CLUB, CHARLESTON NATURAL HISTORY SOCIETY AND SOUTH CAROLINA WILDLIFE FEDERATION,

Respondents.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA VOLUME 1

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TABLE OF CONTENTS
TO THE APPENDICES TO
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF SOUTH CAROLINA

Opinion of the Supreme Court of South Carolina, Opinion No. 23363, Heard June 1, 1990, filed March 11, 1991 . . . . . Appendix A.1

Dissenting Opinion of the Supreme Court of South, Opinion No. 23342, Heard April 2, 1990, filed February 11, 1991 . . . . . Appendix A.2

Final Order of the Fifteenth Judicial Circuit, State of South Carolina, Case No. 88-CP-26-3503, dated September 8, 1989 . . . . . Appendix B

Final Administrative Order of the South Carolina Coastal Council, Heard July 15, 1988 . . . . . Appendix C

Final Order of the Supreme Court of South Carolina, Robert and Alice Beard v. S.C. Coastal Council, et al., dated April 17, 1991 . . Appendix D

S.C. Code Ann. §§48-39-10 to 39-220 (1976) (Beachfront Management Act) . . . . . Appendix E

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Robert and Alice Beard, Respondents,

vs.

South Carolina Coastal Council, Sierra Club, Charleston Natural History Society and South Carolina Wildlife Federation, Appellants.

Appeal from Horry County
James E. Moore, Judge

Opinion No. 23363

Heard June 1, 1990 - Filed March 11, 1991

REVERSED

C. C. Harness, III, of South Carolina Coastal Council, of Charleston, for appellant South Carolina Coastal Council; James Chandler, Jr., of Pawleys Island, for appellants Sierra Club, Charleston Natural History Society and South Carolina Wildlife Federation.

Fred B. Newby, of Myrtle Beach, for respondents Robert and Alice Beard.

ROBERT and ALICE BEARD v.
S. C. COASTAL COUNCIL, et al.

Dwight F. Drake, of Nelson, Mullins, Riley & Scarborough of Columbia, for Amicus Curiae, S.C. Tourism Council.

TOAL, A.J.: This case involves the denial of a permit application to build a bulkhead on beachfront property. The circuit court found that while the permit was properly denied, it constitutes an unconstitutional taking. We find that it does not and therefore reverse.

FACTS

On February 4, 1987, Robert and Alice Beard applied for a permit to construct a bulkhead approximately 205 feet in length across four lots of beachfront property.[1] The proposed bulkhead would advance the

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[1]The case is governed by the 1977 Coastal Zone Management Act because the application of was submitted prior to the passage of the 1988 Beachfront Management Act.

location of an existing bulkhead 18.5 feet seaward on two lots, 23.9 feet on a third lot and would be new construction on the fourth lot. All construction would take place in the beach critical area regulated by the Council.

The Beards stated that the purpose for the project was erosion control. When evidence was revealed that this area was not eroding, but rather accreting, the Beards admitted that they wanted to build the wall on their property line so they would be able to sell this property and to level it off so their tenants would not have to walk uphill or over a dune to the beach.

ROBERT and ALICE BEARD v.
S. C. COASTAL COUNCIL, et al.

The permit was denied by the Permit Administrator and Coastal Council for several reasons. First and foremost, the proposed construction would have violated the legislative policies of the Coastal Zone Management Act ("Act"). Like the 1988 Beachfront Management Act, the purpose of the 1977 Act was to protect, restore and enhance the coastal environment. To fulfill this purpose, the Act placed specific restrictions on the construction of bulkheads in the critical area. The proposed construction of the new bulkheads on the Beards' property did not fall within a statutory exception. In addition, the area was accreting thereby eliminating any need for new erosion control devices. Furthermore, the Beards

had existing bulkheads and had other alternatives available.

The circuit judge concluded that the permit was properly denied on the basis that the Council was "protecting a valuable resource and doing it in a manner consistent with the intent of the Coastal Zone Management Act to protect and wherever possible to restore significant natural resource critical areas." The lower court recognized that a "substantial and legitimate State interest" was involved but found that the denial of the permit constituted a "taking" because the denial of the permit had the effect of making the area between the existing and proposed wall a public beach. We disagree.

DISCUSSION

It is important to note at the outset that the Beards' complaints concern only a portion of their property. The Beards contend that only the area between the existing wall and the proposed wall has been "taken". On two lots this involves 18.5 feet and on the third lot, this portion consists of 23.9 feet. Each lot is approximately 125 feet deep. Therefore, over 100 feet on each lot remains unaffected. As an initial matter, the Beards' approach to a "takings" contention in the context of a zoning regulation is inaccurate. "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely

abrogated . . . . [The] Court focuses rather . . . on the . . . parcel as a whole." Penn Central Trans. Co. v. New York City, 438 U.S. 104, 130-31, 98 S.Ct. 2646, 2662-63, 57 L.Ed.2d 631 (1978).

Furthermore, the Beards may still sell the entire piece of property on each lot, including the area between the proposed and existing walls. Each lot contains rental units which are unaffected by any decision concerning the application. The Beards may continue to utilize the rental units. They may also exclude persons from the area between the proposed and existing walls by posting signs and having trespassers ejected from the property.

Thus, the enforcement of the regulation in this case has had a minimal impact on the Beards property. Indeed, the exercise of police power in this case is much like that utilized in zoning cases which involve set back requirements. We have long recognized the principle that the power to zone is exclusively for the legislature and that zoning decisions will not be interfered with when made in the exercise of the governing body's police power to accomplish the desired end unless there is a plain violation of citizens' constitutional rights. Talbot v. Myrtle Beach Board of Adjustment, 222 S.C. 165, 72 S.E.2d 66 (1952). In cases involving set back requirements, this Court has always looked at the application and impact on the individual property owner.

See e.g., Dunbar v. City of Spartanburg, 266 S.C. 113, 221 S.E.2d 848 (1976). It is clear that the application of the Act to the Beards' property in this case does not result in a violation of their constitutional rights.

This conclusion is buttressed by our recent decision in South Carolina Coastal Council v. Lucas, Op. No. 23342 (S.C. Sup. Ct. filed February 11, 1991), wherein we held that no compensation is due a landowner whose private use threatens serious public harm.

The State has a legitimate interest in protecting the public from serious harm. In the Act, the Legislature made specific findings regarding the coastal environment

and set forth policies concerning the protection of the beaches. The Beards did not challenge the legislative findings and policies, nor did they challenge the lower court's conclusion that a "substantial and legitimate State interest" was involved. The failure to contest these findings and policies constitutes a concession that the protection of the coastal environment is a substantial State interest and that regulation of the property is necessary to protect against serious public harm. Protection against serious public harm justifies strict government regulation of the property thereby prohibiting the finding that the property has been "taken". Lucas, supra, and cases cited therein.

Having reached this conclusion, we need not address the remaining issues on appeal.

The lower court is **REVERSED**.

GREGORY, C.J., and FINNEY, A.J., concur. **HARWELL, A.J.,** dissenting in separate opinion. **CHANDLER, A.J.,** concurring in separate opinion.

HARWELL, A.J., dissenting in separate opinion.

ROBERT and ALICE BEARD v.
S. C. COASTAL COUNCIL, et al.

DISSENT

HARWELL, A.J.: I respectfully dissent. I would affirm the circuit court's finding that the denial of the permit constituted an unconstitutional taking. For a complete analysis of my reasoning, see my dissent in South Carolina Coastal Council v. Lucas, Op. No. 23342 (S.C. Sup. Ct. filed February 11, 1991) (Davis Adv. Sh. No. 4 at 21).

ROBERT and ALICE BEARD v.
S. C. COASTAL COUNCIL, et al.

CHANDLER, A.J., concurring in separate opinion.

CHANDLER, A.J. (Concurring): While I concur in the majority's conclusion that reasonable setback requirements do not constitute a taking for which compensation is required, I adhere to the dissent's position in South Carolina Coastal Council v. Lucas, Op. No. 23342 (S. C. filed February 11, 1991), that a taking arises whenever the regulation deprives the landowner of "economically viable use" of his property.

STATE OF SOUTH CAROLINA
In the Supreme Court

David H. Lucas, Respondent.

vs.

South Carolina Coastal Council, Appellant,

Appeal from Charleston County
Larry R. Patterson, Special Circuit Judge

Opinion No. 23342
Heard April 2, 1990 - Filed
February 11, 1991

D I S S E N T

HARWELL, A.J.: I respectfully dissent. For the reasons discussed below, I would affirm the circuit court order which determines that application of the Beachfront Management Act under these facts does constitute a taking, and hold that the Coastal Council must either

compensate Lucas in the amount set forth in the order of the circuit court or issue a permit for the construction of habitable structures on his property pursuant to the 1990 amendments to the Beachfront Management Act.[1]

DISCUSSION

The Fifth Amendment of the United States Constitution provides that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V. The South Carolina Constitution provides that "private

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[1]Although certain amendments to the Beachfront Management Act had not been enacted at the time this case was abjudicated, I note that neither the majority opinion nor the dissent prohibit Lucas from pursuing a course of action under the 1990 amendments which would enable him to construct a new habitable structure within the guidelines set forth in the amendments. See, S.C. Code Ann. §48-39-290(A)(6) and 48-39-290(D)(1) (Supp. 1990).

property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made therefor." S.C. Constr. Art I, § 13. Takings cases are generally recognized as falling into one of two categories: Those pursuant to an exercise of eminent domain and those pursuant to an exercise of the police power. Eminent domain involves the taking of property for public use for which compensation is required to be made; police power involves regulation of private property to prevent its use in a manner detrimental to the public interest and will not necessarily result in a taking in the constitutional sense. Carter v. South Carolina Coastal Council, 281 S.C. 201, 204, 314 S.E.2d 327,1 329 (1984). A governmental taking of property may, however, be accomplished

without the formal apparatus of eminent domain; a taking may result from a government regulation in a particular areas. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 316, 107 S.Ct. 2378, 2386, 96 L.Ed.2d 250, 265 (1987).

The question of when regulation pursuant to a police power becomes a taking is not easily answered. Despite the wealth of authority on the subject of regulatory takings, this is an area of considerable confusion. Indeed, as Justice Stevens recognized in his dissent in First English Evangelical, the regulatory takings decisions of the United States Supreme Court have been "open-ended and standardless." 482 U.S. at 340, 107 S.Ct. at 2378, 96 L.Ed.2d at 280 (footnote 17). As one commentator noted, the

"[r]egulatory taking doctrine is the most perplexing area of American land use law."[2] This case necessitates explication of the pertinent decisions in this area and reflects my interpretation of regulatory takings law.

The starting point for this discussion with the 1887 case of Mugler v. Kansas, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887) in which the Supreme Court recognized that "government can prevent a property owner from using his

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[2]Settle, Regulatory Taking Doctrine in Washington, Now You See It, Now You Don't, 12 U. Puget Sound L. Rev. 339 (1989). The lack of uniformity in this area has been noted by other commentators. See e.g. C. Harr, Land Use Planning (3d ed. 1977); Berger, A Policy Analysis of the Taking Problem, 49 N.U. U. L.Rev. 165 (1974); Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L.Rev. 1165 (1967); Rose, Mahon Reconstructed: Why the Takings Clause is Still a Muddle, 57 S.Cal. L.Rev. 56 (1984).

property to injure others without having to compensate the owner for the value of the forbidden use." Penn Central Transportation Co. v. New York, 438 U.S. 104, 144, 98 S.Ct. 2646, 2669, 57 L.Ed.2d 631, 661 (1978). At issue in Mugler was a statute prohibiting use of a distillery for the manufacture of intoxicating liquors. The Supreme Court upheld the statute and reasoned that the power of the State to prohibit uses of property "prejudicial to the health, the morals, or the safety of the public, is not . . . burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain." Mugler v. Kansas, 123 U.S. at 669, 8 S.Ct. at 301, 31 L.Ed. at 213.

Mugler stands for the proposition that where the legislature has deemed an

act to be necessary for the public's health, safety and welfare, the judiciary need not scrutinize the acts of the legislature regardless of the extent of loss suffered by the property owner. A prohibition on the use of property, enacted in the interest of the community as a whole, the Mugler Court held, cannot be deemed a taking or appropriation.

For the same reasons as those articulated in Mugler, the Supreme Court has held other state action not to constitute a compensable taking when necessary to prevent property owners from using such property in a manner which I perceive to be best described as nuisance oriented. See e.g., Headacheck v.Sebastian, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915) (statute disallowing operation of a brickyard in a residential

area); Reinman v. City of Little Rock, 237 U.S. 171, 35 S.Ct. 511, 59 L.Ed. 900 (1915) (law disallowing operation of livery stable in downtown area); Miller v. Schoene, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928) (statute ordering destruction of red cedar trees because they produced cedar rust fatal to apple trees, an important state crop).

The viability of the Mugler analysis was first questioned in Pennsylvania Coal v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). Instead of following the Mugler approach of deferring to the judgment of the legislature with respect to the regulation at issue in Pennsylvania Coal, the Supreme Court instead evaluated the subject regulation and determined that the public interest it protected was not sufficient

to warrant an exercise of police power. Justice Holmes, writing for the majority, noted that "[a] . . . strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal v. Mahon, 260 U.S. at 416, 43 S.Ct. at 160, 67 L.Ed. at 326. Rather, the general rule as enunciated in Pennsylvania Coal is that "[w]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. at 415, 43 S.Ct. at 160, 67 L.Ed. at 326.

The test which emerged from Pennsylvania Coal is that a reviewing court should first determine whether a regulation sufficiently implicates the public interest such that a state can

enact it as a legitimate police power measure; and second, determine the extent of diminution in value suffered by the property owner. If the regulation goes too far, it is a taking for which an owner must be compensated. The test has recently been more succinctly stated to be that land use regulation can effect a taking if it "does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land." Agins v. Tiburon, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106, 112 (1980).

After Pennsylvania Coal, the Mugler rule was no longer viewed as dispositive. In fact, the Mugler approach was essentially the same as that of the minority opinion in the Pennsylvania Coal case: that as long as a regulation serves

an appropriate means to public end, restriction upon use does not constitute a taking merely because it deprives the owner of the property's only profitable use. Pennsylvania Coal v. Mahon, 260 U.S. at 417, 43 S.Ct. at 160, 67 L.Ed. at 326. (Brandeis, J. dissenting). Therefore, after Pennsylvania Coal, the Mugler case was thought by many to have fallen by the wayside. This perception was dispelled however, five years later with the Supreme Court's decision in Miller v. Schoene, supra. In Miller, the Supreme Court, applying Mugler, upheld a statute which required the owners of red cedar trees to destroy the trees because they produced cedar dust, a disease fatal to the state's apple crop. Thus, after Miller, some confusion existed as to whether to apply the Mugler rule or that of Pennsylvania

Coal. In two subsequent cases, Goldblatt v. Hempstead, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962) and Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), the Supreme Court applied, respectively, the Mugler and the Pennsylvania Coal test.

In Goldblatt v. Hempstead, supra, the Supreme Court upheld, pursuant to a Mugler nuisance analysis, a statute forbidding excavation of sand below the water line. The Goldblatt Court nonetheless recognized that certain regulations may be "so onerous as to constitute a taking which constitutionally requires compensation." 369 U.S. at 594, 82 S.Ct. at 990, 8 L.Ed.2d at 133.

In Penn Central Transportation Co. v. New York City, supra., the Supreme

Court upheld a landmark preservation law which prohibited Penn Central Railroad from erecting an office tower on top of the Grand Central Railroad Terminal. In Penn Central, the Court candidly admitted that it had previously been unable to develop any "set formula" for determining when "justice and fairness" require the government to compensate landowners. 438 U.S. at 124, 98 S.Ct. at 2659, 57 L.Ed.2d at 648. In upholding the preservation law, the Court applied the Pennsylvania Coal test and determined that because the regulation served a strong public interest, did not completely destroy the economic value of the property, and did not substantially interfere with reasonable investment backed expectations, it did not constitute a taking. The test first enunciated in Pennsylvania Coal,

therefore continued in Penn Central to be that regulation can effect a taking if it "does not substantially advance legitimate state interests . . . or denies an owner economically viable use of its land." Because the preservation law advanced a legitimate state interest and the owner retained economically viable use of the terminal, a taking was determined not to have occurred.

The next significant decision of the Supreme Court to address the test to be applied in regulatory takings cases is Keystone Bituminous Coal Association v. Debenedictis, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987). In Keystone, the plaintiffs challenged the constitutionality of a Pennsylvania statute known as the Bituminous Mine Subsidence and Land Conservation Act. The

Subsidence Act required coal companies to keep in the ground at least 50% of the coal beneath defined structures to protect these structures from subsidence damage. Although the Supreme Court held that a taking had not occurred, the method by which it arrived at this holding has been the subject of considerable debate. Part of the reason for this debate is the persistent confusion over when Mugler is applicable. Although it continues to recognize the vitality of the Mugler line of cases, the Keystone Court nonetheless continues to retain the two prong test first recognized in Pennsylvania Coal. The Keystone Court unequivocally recognizes that it retains this as the test by stating:

> "The two factors that the Court considered relevant [in Pennsylvania Coal],

> have become integral parts of our taking analysis. We have held that land use regulation can effect a taking if it 'does not substantially advance legitimate state interest, . . . or denies an owner economically viable use of his land.'" Agins v. Tiburon, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106, 112 (1980) (citations omitted); see also, Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631, 648 (1978).

and continues by holding that: "[a]pplication of these tests to petitioners' challenge demonstrates that they have not satisfied their burden of showing that the [Act] constitutes a taking." 480 U.S. at 485, 107 S.Ct. at 1242, 94 L.Ed.2d at 488. Clearly then, despite the myriad of considerations which go into an analysis of the factors

included in the above-mentioned test, it still emerges as the test after Keystone.

The first prong of this traditional test is discussed under the heading of "The Public Purpose." Keystone Bituminous Coal Association v. Debenedictis, 480 U.S. at 485, 107 S.Ct. at 1242, 94 L.Ed.2d at 488. It is at this point that the Court explicitly holds that its Mugler line of cases were not overruled by Pennsylvania Coal. 480 U.S. at 490, 107 S.Ct. at 1244, 94 L.Ed.2d at 491. The Court then goes on to affirm that a state's interest in "preventing activities similar to public nuisances is a substantial one, which in many instances has not required compensation." 480 U.S. at 492, 107 S.Ct. at 1246, 94 L.Ed.2d at 493. The Court further holds that the act at issue in Keystone "plainly seeks to

further such an interest." Id. In so holding, the Keystone Court equates subsidence mining to the nuisances sought to be abated in the Mugler line of cases. Accordingly, the Keystone opinion reaffirms the teaching of Mugler that certain uses are so noxious that an owner is not entitled to compensation, and that "the nature of the state action plays [an important role] in our takings analysis." 480 U.S. at 490, 107 S.Ct. at 1245, 94 L.Ed.2d at 491. Although the Keystone opinion marks a continued recognition of the Mugler rule, it does not abolish the Pennsylvania Coal factors. Further, the Keystone Court does not hold that every exercise of police power can escape the Constitution by calling that which it seeks to prevent a nuisance. Such an interpretation would totally eviscerate

the takings clause. Indeed, if we were to accept an interpretation of Keystone, based on Mugler, that any exercise of police power could not effect a taking, we would have to say that there would never be any need to reach the second part of the test: diminution in value. No matter how valueless a person's property, if the taking was pursuant to a valid exercise of the police power it could never be compensated. As feared by the dissenters in Keystone, this could become an exception which would swallow the rule. Keystone, 480 U.S. at 512, 107 S.Ct. at 1256, 94 L.Ed.2d at 505 (Rehnquist, J., dissenting).

The Constitution of the United States and of South Carolina provided a just compensation clause for the protection of citizens; surely the framers

of these constitutions never intended for this protection to be distinguished away in order to allow states to avoid compensating an individual required to bear a burden which in fairness should be borne by all. Therefore, I simply refuse to accept that the Mugler line of cases "grant carte blanche to government agencies to regulate private property into oblivion." Berger, The Year of the Taking Issue, 1 B.Y.U.J. Pub. L. 261, 279 (1987). Rather, I would hold that some factual situations may lend themselves to the harsh rule in Mugler, whereas others must be recognized as situations in which one individual should not be called upon to bear a burden which in fairness should be borne by all. My interpretation of Keystone is that a court must first review the public purpose of a regulation. Some

regulations will be held unconstitutional because the public purpose for which they are enacted is not deemed to be legitimate or sufficient. Other regulations may provide for the prevention of a nuisance and as such will not require compensation to an affected landowner. Other regulations not designed to prevent a nuisance may nonetheless legitimately advance state interests and yet require compensation upon a showing of a loss of economically viable use of land.

In my opinion, the Beachfront Management Act does not have as its primary purpose the prevention of a nuisance and is therefore not subject to the Mugler analysis. The activities and effects the Act seeks to prohibit do not rise to such a level as to be fairly considered "noxious." The primary purpose

of the Beachfront Management System Act is to protect and foster the regeneration of the beach/dune system, the benefits of which enure to the State of South Carolina by among other things, promoting tourism, creating a habitat for indigenous flora and fauna, creating a place which harbors natural beauty, and providing a barrier and buffer from high tides, storm surge, hurricanes and normal ercsion. The Act also lists other similar findings and policies of the Act. Upon my review of the Act, I conclude that none of these intended purposes can fairly be said to resemble a nuisance. The goals which the Act seeks to accomplish do not appear in any way similar to protecting an important state resource from an infectious disease (Miller v. Schoene), prohibiting excavations below the water table for

safety purposes (Goldblatt), prohibiting an illegal use of a distillery (Mugler), preserving the residential integrity of an area by prohibiting a brickyard (Hadacheck) or protecting patrons of a downtown area from the unpleasantness associated with a livery stable (Reinman). Accordingly, I do not find as did the Keystone Court, that the Act at issue here plainly seeks to further "public interest in preventing activities similar to public nuisances" such that it is entitled to the protection afforded by Mugler.

This is not to say that the Act itself is invalid. Even though an act is not of the Mugler variety, it can remain valid if it nonetheless advances a legitimate state interest. However, if it is not a Mugler type act, despite the fact that it advances a legitimate state

interest, compensation will be necessary where the act deprives an owner of economically viable use of his land. Lucas has conceded the "laudable" goals of the Act and does not challenge the legitimacy of its public purpose. Thus, the remaining question is whether his property retains economically viable use.

Although the Keystone Court indicated that it could end its analysis with its determination that the Subsidence Act sought to "prevent activities similar to public nuisances," it held that it "need not rest [its] decision on this factor alone, because petitioners have also failed to make a showing of diminution of value sufficient to satisfy

the test set forth in Pennsylvania Coal[3] and our other regulatory taking cases." Keystone Bituminous Coal v. Debenedictis, 480 U.S. at 493, 107 S.Ct. at 1246, 94 L.Ed.2d at 493. The Court did not have to reach the diminution in value question because the only issue left to it by the federal district court was whether the "mere enactment of the statues and regulations constitutes a taking." Id. The next phase of the case would have concerned evidence about the actual effects the Subsidence Act had on the owners' property.

In assessing the question of whether Lucas retains any economically viable use of his land, we are nonetheless

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[3]We note that this is another reference by the Keystone Court to the continued vitality of the Pennsylvania Coal test.

guided by the Keystone decision. The Keystone Court held that the critical distinction in this regard involves a comparison of the value that has been taken from the property with the value that remains in the property. 480 U.S. at 497, 107 S.Ct. at 1248, 94 L.Ed.2d at 496. "[W]here an owner possesses a full bundle of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety." Id. [citation omitted]. Applying these factors, the Keystone Court determined that

> When the coal that must remain beneath the ground is viewed in the context of any reasonable unit of petitioners' coal mining operations and financial-backed expectations, it is plain that petitioners have not come close to satisfying their burden of proving that they have

> been denied the economically viable use of that property.

480 U.S. at 499, 107 S.Ct. at 1249, 94 L.Ed.2d at 497. The Court further determined that there was no showing that "petitioners reasonably investment-backed expectations were materially affected." Id.

The facts of Keystone contrast sharply with those present in this case. The testimony in this case was that Lucas purchased two lots for development. Lucas planned to erect single family dwellings on the lots and intended to put one home on the market for sale and retain one for his family. At the time Lucas invested in these lots, his reasonable expectations were that he could proceed with these plans. However, according to the testimony of Lucas' appraiser, the Act's

prohibition against the erection of any habitable structure caused the value of the lots to plummet to zero. The lots now lack fair market value and there is no economically viable use. Although the Coastal Council introduced testimony that the lots would have some value, its expert was completely unable to explain the method relied upon to arrive at this conclusion. The trial judge chose the conclusion of Lucas' expert over that of the Coastal Council's expert. This Court generally defers to the discretion of the trial judge on these matters because he is in a better position to observe the demeanor of the witnesses and pass on their credibility. Further, from my own review of the record, I find the valuation of the Coastal Council's expert to have been totally speculative. Accordingly,

since Lucas' land has no fair market value, I would hold that the second part of the test, deprival of economically viable use, has been met and a taking has been established.

Having determined that application of the Act constitutes a taking under the Constitution of the United States, it is not necessary to examine whether it constitutes a taking under the South Carolina Constitution.[4] The remaining

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[4]There are several South Carolina decisions involving takings under the compensation clause. One of the most recent cases is Carter v. S.C. Coastal Council, 281 S.C. 201, 314 S.E.2d 327 (1984) in which we held that restrictions which disallowed a landowner from filling in wetlands did not constitute a taking. In Carter, this Court did not specify whether its analysis of the takings issue was pursuant to federal or state law. Regardless, I do not see Carter as controlling under the facts of this case, particularly since we must look to federal decisions for the proper interpretations of the United States Constitution. In

question is the appropriate remedy to be afforded the property owner now that a taking has been determined. The most recent amendments to the Act, specifically, S.C. Code ann. §§ 48-39-290(A)(6) and 48-39-290(D)(1) (Supp. 1990), provide that an applicant may request a special permit to build a structure other than an erosion control structure or device seaward of the baseline that is not otherwise allowed pursuant to Sections 48-39-250 through 48-39-360. If Lucas' application is denied, in the alternative, I would hold that Lucas be compensated for the loss of use

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Carter, we held that every regulation "will not necessarily be a [taking] in the constitutional sense." Implicit in this is a recognition that there nonetheless will be situations where regulation will be a taking. As indicated by the analysis in this opinion, I would hold that this is one of those situations.

of the land pursuant to the circuit court order.

Although I affirm the decision of the circuit court that a taking occurred, I would remand the matter to the Coastal Council for its decision as to whether to issue permits in view of the recent 1990 amendments to the Beachfront Management Act for construction of a habitable structure on the lots. If the Council should decline to issue such special permit, I would require that Lucas be compensated pursuant to the circuit court order.

CHANDLER, A.J., concur.

STATE OF SOUTH CAROLINA	)	IN THE COURT
	)	
COUNTY OF HORRY	)	OF COMMON PLEAS
	)	
Robert Beard and Alice Beard,	)	
	)	
Petitioners,	)	FINAL ORDER
	)	
vs.	)	
	)	(88-CP-26-3503)
The South Carolina Coastal Council, Sierra Club, Charleston Natural History Society, and South Carolina Wildlife Federation,	)	
	)	
Respondents.	)	

This matter came before me for a final hearing on June 19, 1989. This is a judicial appeal of a final administrative action by the South Carolina Coastal Council. Present at the hearing were Fred B. Newby of the Horry County Bar, representing the Plaintiffs; C.C. Harness, III, General Counsel to the South Carolina Coastal Council; James S. Chandler of the Georgetown County Bar, representing the

Sierra Club, the Charleston Natural History Society and the South Carolina Wildlife Federation; and Dwight F. Drake, of the Richland County Bar, representing the South Carolina Tourism Council. The Tourism Council made a motion to be allowed to file an amicus curaie brief on behalf of the Plaintiffs and, with all parties consenting, that motion was granted.

At the hearing, oral arguments were heard by all of the named parties. Written briefs were also subsequently filed by all parties.

The Parties

The Petitioners in this action are Robert Beard, Jr. and Alice Beard, two individuals who are citizens and residents

of Horry County, South Carolina. The administrative action which is the subject of this case involves four adjoining oceanfront lots belonging to the Petitioners and situated in Horry County.

The Respondent, South Carolina Coastal Council, is a state administrative body created by the legislature in §48-39-40 of the Coastal Zone Management Act, as it was enacted in 1977. The remaining respondents are intervenors in the administrative proceeding.

The Property

The administrative action which is the subject of this case relates to property consisting of Lots 2, 3, 4, and 5 of Block SF, of the Cherry Grove section

of North Myrtle Beach, South Carolina (the "Property").

Jurisdiction

This is an action for judicial review of an administrative proceeding undertaken by the South Carolina Coastal Council. The review is sought pursuant to statutory authority conferred in the South Carolina Coastal Zone Management Act (§48-39-10, et seq., Code of Laws of South Carolina, 1976, as amended - the "Act") and the South Carolina Administrative Procedures Act (§1-23-130, et seq., Code of Laws of South Carolina, 1976, as amended - the "APA"). The action involves real property located in Horry County, South Carolina. The parties stipulated that this action is governed under the Act

as it existed prior to its 1988 amendments.

The Factual Background of this Case

The facts as set out in the administrative proceeding reveal the following:

The Beards are the fee-simple owners of the Property, having acquire the lots at different times over the years. Lot 4 was acquired in 1961, Lot 3 was acquired in 1966, Lot 2 was acquired in 1970 and Lot 5 was acquired in 1980. On each of the lots there are structures that consist of two-story wood frame houses that are rented by the Petitioners to the public.

Each of the lots lies between, and adjoins, the Ocean Boulevard on the west and the Atlantic Ocean beaches on the east. Each of the lots is 125 feet in depth, from the road to the beach, and 50 feet in width.

At some time prior to the enactment of the Act in 1977, the Petitioners, or their predecessors in title, erected wooden bulkheads on the lots, none of which were located on the easternmost property line of the Property, but instead were some distance landward of the Beards' property line. These bulkheads are shown as the "existing seawall" on the plat which is in the record.

On February 4, 1987, the Petitioners filed an application with the

respondent Coastal Council for the purpose of erecting a new wooden bulkhead on their property in the approximate location of the easternmost property line of the Property, still on their land, and thus having the effect of moving the bulkhead approximately 18 feet to 24 feet seaward of its original position. The permit as applied for would move the existing wall on Lots 2 and 3 approximately 18.5 feet forward. On Lot 4 the seawall would be brought forward approximately 23.9 feet and as to Lot 5, the permit request construction of an entirely new wall consistent with the movement forward of the wall on the other lots. The permit if granted would advance the bulkhead seaward to the property line into an area that is characterized as dry-sand beach.

According to the permit application, the work, as proposed and shown on the attached plans consists with constructing the bulkhead/seawall of timber and would be built at an elevation of +8 mean sea level. The Petitioners propose that approximately 2,270 cubic yards of fill material would be placed behind the wall. The purpose stated for the project is erosion control.

The Administrative Proceeding

By letter dated March 30, 1987, the Coastal Council, through Steve Moore, Permit Administrator, denied the Petitioners' permit application. On April 7, 1987 the Petitioners filed their Notice of Intent to Appeal, and on April 22, 1987, they filed, with the Coastal

Council, their Grounds for Appeal and Appeal.

In that filing the Petitioners asserted several grounds in asking the full Coastal Council to overturn the permit denial which had been made by its staff. Among those reasons, the Beards asserted that:

> "The actions of the Staff have the effect of [creating] a 'public' beach on land that is privately owned by the Defendants. This action, together with the [Council's] prevention of any valid use of the land by the Defendants, constitutes a 'taking', by

the State, of the Defendants' private property without due process or just compensation. Article I, Section 13, South Carolina Constitution; U.S.C.A. Const. Amend. 5" Appeal and Grounds for Appeal, p. 2.

"The effect of the [Council's] decision is to take private property of the [Beards] ... and convert it to public use, all of which violates Section 48-29-30(c), Code of Laws of South Carolina, 1976, as amended. As such this action should be set

aside by the full Council." Appeal and Grounds for Appeal, p. 2, 3.

"In deciding permit requests the [Council] must comply with Regulation 30-11. The [Beards] have met all these requirements. The action of the [Council] in denying the permit is both arbitrary and capricious and not founded in fact." Appeal and Grounds for Appeal, p. 3.

"Section 48-39-150(A) of the Code states that, in determining permit

questions, the Council 'shall base its determination on the individual merits of each application...'. No factual determinations were made that the permit would be detrimental to the beach... prior to its decision." Appeal and Grounds for Appeal, p. 3.

"The Defendants' land is in an area where the beach has grown ... The seawall requested by the [Beards] ... the use of approximately five thousand (5,000) square feet of their private

property ..." Appeal and Grounds for Appeal, p. 4.

Following a period of discovery the administrative appeals process proceeded to a full evidentiary hearing before a Hearing Officer for the Coastal Council. This hearing took place over several days between December 1987 and March 1988. The transcripts of these hearings are part of the record.

On July 1, 1988 the Hearing Officer issued her Recommendations. These were objected to by the Petitioners in a final hearing before the full Coastal Council on July 15, 1988. By its Final Administrative Order, dated September 2, 1988, the Coastal Council upheld the Coastal Council staff's denial of the

Beards' permit. This denial gave rise to the present action.

Before the full Coastal Council the Beards argued, and briefed, not only the same grounds for reversal that were set out in their Appeal and Grounds for Appeal, but also others that arose during the evidentiary hearing. (The Beards' Appellants' Brief is a part of the record before the Court in this action.) Among their grounds for reversal were:

a. The proposed work was on the Beards' private property;

b. The beach in question is accretional and not eroding;

c. All of the expert witnesses that testified at the hearing

stated that the proposed work would not harm the beach;

d. Neither the City of North Myrtle Beach, nor the adjoining landowners, objected to the bulkhead;

e. There would be no cumulative impact of the proposed work, due to the 1988 amendments to the Beachfront Management Act;

f. Each case must be decided on its own merits;

g. The Beards had complied with §48-39-150 and Regulation 30-11 relating to the issuance of permits;

h. Factual findings by the Staff were erroneous;

i. The effect of the denial was to turn the Beards' property into a "public beach" and would constitute a "taking" of their property.

The recommendations of the Hearing Officer consisted of eighteen (18) pages and addressed most, if not all, of these issues. The Final Administrative Order issued by the full Coastal Council on September 2, 1988 was a thirty-nine (39) page Order that dealt not only with all of the factual, statutory, regulatory and constitutional issues raised by the Beards, but also relied to some degree on

other matters of law not previously raised.

On September 30, 1988 the Beards instituted this action for judicial review by filing their Summons and Petition for Review. All parties were served and have answered and are properly before the Court. The full administrative record has been forwarded by the Coastal Council and is part of the court file in this case.

Authority for the Appeal

As stated above, this appeal is made pursuant to two statutes. First, the appeal is governed and authorized by the South Carolina Administrative Procedures Act. Section 1-23-380 provides the outline for such judicial appeals:

"§1-23-380. Judicial review upon exhaustion of administrative remedies.

(a) A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this article and Article 1. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief or trial de novo provided by law. A preliminary, procedural,

or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

...

(f) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

(1) In violation of constitutional or

statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of

discretion or clearly unwarranted exercise of discretion."

In addition to the Administrative Procedures Act, which provides judicial review of any administrative agency's final actions, the Coastal Zone Management Act also has specific guidelines for appeals of actions by the Coastal Council. Section 48-39-180 provides as follows:

§48-39-180. Judicial review of permit determinations. Any applicant whose permit application has been denied, revoked, suspended or approved subject to

conditions of the Council, or any person adversely affected by the permit, may, within twenty days after receiving notice thereof, file petition in the circuit court having jurisdiction over the affected land for review of the Council's action "de novo" or to determine whether the Council's action so restricts or otherwise affects the use of the property as to deprive the owner of its existing practical use and is an unreasonable exercise of the State's police power because the action constitutes the

equivalent of taking without compensation. If the court finds the action to be an unreasonable exercise of the police power it shall enter a finding that the action shall not apply to the land of the plaintiff, or in the alternative, that the Council shall pay reasonable compensation for the loss of use of the land ... It is specifically intended that any person whose permit application has been denied may have such permit issued by the circuit court having jurisdiction if such

person can prove the reasons given for denial to be invalid." [Emphasis Added]

Although the provisions calling for a "de novo" review have been voided by the State Supreme Court in Guerard v. Whitner, 276 S.C. 521, 280 S.E.2d 539 (1981), the remainder of this section remains in tact.

Scope of Review for Factual Issues

It is settled that the scope of review of factual determinations by administrative agencies in general, and the Coastal Council in particular, is the "substantial evidence" standard. State v. S.C. Coastal Council, 289 S.C. 445, 346 S.E.2d 716 (1986); Carter v. S.C. Coastal

Council, 281 S.C. 201, 314 S.E.2d 327 (1984); Guerard v. Whitner, 276 S.C. 521, 280 S.E.2d 539 (1981). Under this standard it has been said that,

> "The Court will not substitute its judgment for that of the Agency unless it is affected by error of law or clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." State v. S.C. Coastal Council, 289 S.C. 445, 448.

The term "substantial evidence" has been defined as follows:

> "Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached." Carter v. S.C. Coastal Council, 281 S.C. 201, 203.

Using these general rules the court must then review the record of the administrative proceedings. In fact, the review of factual matters must be confined to the existing record, and the court may not substitute its judgment as to the weight of the evidence on questions of fact. See §1-23-380(f) and (g).

In addition to reviewing the factual and evidentiary matters in the record under the substantial evidence standard, the Administrative Procedures Act also allows the court to "...reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

(1) In violation of constitutional or statutory provisions;

(4) Affected by other error of law;

(5) Clearly erroneous in view of the reliable, probative and

substantial evidence
on the whole record;
or

(6) Arbitrary or
capricious..."

Section 1-23-380(g), Code of Laws of South Carolina, 1976.

All of these violations have been alleged by the Beards.

Standard of Review of Constitutional and Legal Questions

As a general rule, courts may look to the constitutional issues raised in or by an administrative proceeding.

"The order or action of an administrative agency may be judicially reviewed as to constitutional questions and questions of constitutional rights." 73A C.J.S. Public Administrative Law and Procedure §229, p. 306.

Also, judicial review of questions of law is permitted.

"On a judicial review of an order, decision, or award of an administrative...agency, questions of law are open for... determination, including an administrative agency's

conclusion of law, or its determination, or decision of a question of law; the court is not bound, or concluded by, but free to substitute its own judgment for the judgment or conclusion of the agency. The reviewing court may correct errors of law and it may interfere with an administrative action where the agency has either violated, misconstrued, improperly construed, or failed to follow the law". 73A C.J.S. Public Administrative Law and Procedure, §242, p. 357-

358. See also, S.C. Tax Commission v. S.C. Tax Board, 278 S.C. 556, 299 S.E.2d 489 (1983).

This general statement of the law has been codified in South Carolina in the previously quoted sections of the State APA.

The Beards, in their Petition, have raised these issues and asked that the permit denial be overturned for the reasons stated, which can be summarized as follows:

(1) The decision is "in violation of constitutional... provisions";

(2) The decision is "in violation of...statutory provisions";

(3) The decision is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record"; and

(4) The decision is arbitrary and capricious".

Motion to Dismiss by Coastal Council

The first matter to be addressed of is a pending motion by the Coastal Council to dismiss the judicial appeal of

the Beards. At the hearing this motion was amended to be a motion for partial dismissal, the counsel for Coastal Council admitting that the issue of an unconstitutional taking was properly before the court. With this amendment, the motion appears to be based upon an assertion by the Coastal Council that the Petitioners' Petition for Review was not sufficiently detailed to give the court, and the Coastal Council, adequate notice of the acts complained of. As its sole authority for this position the Coastal Council cites the case of Smith v. South Carolina Department of Social Services, 284 S.C. 469, 327 S.E.2d 348 (1985). For the reasons set out below, I find this argument unpersuasive and the Smith case clearly distinguishable.

First, and foremost, it cannot be forgotten that this is an appeal of a previous proceeding, not a newly instituted action. In a newly instituted action there is no record before the court and no previous legal interaction between the adverse parties. In such a case the only notice the defendant has of the plaintiff's allegations are the ones set out in his complaint. In an appeal of an administrative action we cannot look at the Petition in isolation and ignore the previous proceedings on which it relies. Without those previous proceedings there could be no appeal.

The Beards' Petition for Review asks for judicial review of the administrative proceeding and for certain other affirmative relief. Among other

things the Beards allege that the Coastal Council's actions were:

> "(a) In violation of constitutional and statutory provisions of the law;
>
> (b) Affected by error of law;
>
> (c) Clearly erroneous in view of the reliable probative and substantial evidence on the whole record; and
>
> (d) Arbitrary and capricious and characterized by abuse of discretion."

As stated, the Coastal Council concedes that the question of an unconstitutional "taking " is properly before the court. Although our ruling in this case may make the balance of Coastal Council motion moot, we will address it nevertheless.

The Beards' Petition is brought pursuant to the APA and §48-39-140 of the Act. The allegations in the Petition are the very requirements set out in §1-23-380 of the APA for reversal of an administrative action. It is the Petitioners' position that, viewed in the context of the entire proceeding, and in accordance with the APA, the Petitioners' Petition gives the court and opposing parties ample notice of the errors complained of. I agree for the following reasons:

1. The APA and the Petition refer the court to the "substantial evidence" test "on the whole record". Obviously this test can only be met by having the court review the entire record for the presence, or lack of, "substantial evidence". This allegation is clearly sufficient to raise that issue, and is, in fact, the only reasonable way to do so.

2. The record submitted to this Court by the Coastal Council is complete, and it demonstrates that the Council agrees with the position that the entire record must be reviewed.

3. The allegations relating to constitutional and statutory violations are further defined by alleging a "taking" of the Petitioners' property, and those questions were fully

pled, briefed and argued in the record which the Court has before it.

4. The case cited by the Coastal Council is clearly distinguished from the one at bar since in that one the Petition merely stated that the petitioner was "aggrieved by the final decision", with no other allegations.

5. Petitions in similar cases that have been reviewed as far as the State Supreme

Court have had far fewer specifics alleged than that of the Petitioners, as in the often cited case of Carter v. S.C. Coastal Council, 281 S.C. 201, 314 S.E.2d 327 (1984). (A copy of that Petition was attached to Petitioners' Brief).

6. The purpose of pleadings is to place the adverse party on notice of the questions at issue. Bradley v. Hullander, 266 S.C. 188, 222

S.E.2d 283 (1976); Langston v. Niles, 265 S.C. 445, 219 S.E.2d 829 (1975). This appeal should not be viewed in a vacuum but in light of the previous proceedings. Since all of the issues have not only been pled, but argued and brief by all parties, the Coastal Council can hardly say that they are not intimately familiar with the issues. See Owen Steel Co. v. S.C. Tax Commission, 281 S.C. 80, 313

S.E.2d 636 (Ct. App. 1984) cert. den. 106 S.C. 1643, in which the court stated: "...the APA requires one seeking judicial review of a final agency decision to serve the agency with a copy of the petition for review. This requirement insures that the agency will receive notice of any proceeding to review its decision." 281 S.C. 86. [Emphasis Added.]

7. Since this appeal is not an evidentiary or fact finding proceeding, evidentiary facts need not be pled or matters realleged which are already in the record before the court.

8. When a pleading is demurred to for alleged failure to state a cause of action, it must be liberally construed in favor of the pleader and sustained if the facts and reasonable inferences

to be drawn therefrom entitle him to relief on any theory of the case. Todd v. South Carolina Farm Bureau, 276 S.C. 284, 278 S.E.2d 607 (1981).

9. Pleadings should be construed liberally so that substantial justice is done between the parties. Manning v. Dial, 271 S.C. 79, 245 S.E.2d 120 (1978).

10. The fact that placing in issue the sufficiency of evidence for the

administrative ruling is sufficient can be seen in Roche v. S.C. Alcoholic Beverage Control Comm., 263 S.C. 451, 211 S.E.2d 243. There the Court stated that "...the sole issue on appeals of this nature is whether the Commission had sufficient evidence to support its decision". 211 S.E.2d at 245.

Based upon the foregoing, and the full record of the administrative proceeding that is already before this

Court, I hereby deny the motion to dismiss.

The Appeal

Having determined that the Coastal Council's motion to dismiss, as amended, should be denied, we must now turn to the merits of the Petitioners' appeal. The first question to be addressed is whether the Coastal Council properly denied the Beards' permit request. Only after determining the answer to that question should we then turn to the constitutional issues.

The area seaward of the existing bulkhead is all beach critical area which is regulated by the South Carolina Coastal Council pursuant to §48-39-10, et. seq. Within this beach/dune critical area on

the salt water beaches of South Carolina, the Council permits only two uses, that being the construction of a walkway which is exempted under §49-39-30 and the construction of erosion control structures under certain strict requirements. It was the Council's determination that the issuance of a permit would be in violation of the Coastal Management Act, the Coastal Management Program and the Rules and Regulations promulgated thereunder as it relates to seawalls, and that the application did not fit into the exemption provision.

The decision of the Defendant to deny the permit is supported in fact and law by the following:

The 1977 Coastal Management Act was passed by the General Assembly as a

recognition that "increasing and competing demands upon the lands and waters of our coastal zone occasion by population growth and economic development...have resulted in the decline or loss of living marine resources, wildlife, nutrient rich areas, permanent and adverse changes to ecological systems, decrease in open space for public use and shoreline erosion." (§48-39-20(B)). It further recognized that "important ecological, cultural, natural, geological and scenic characteristics...are being irretrievably damaged or lost by ill-planned development," and that there was an "urgent need to protect and give high priority to natural systems in the coastal zone while balancing economic interests." (See 48-39-20(E) and (F) respectively.)

In addition to the findings of the Act, both the program document and the rules and regulations find substantial value in dry-sand beaches. Rule 30-1(B) sums up the findings concerning the value of this resource most succinctly, as follows:

> Each year millions of South Carolina citizens and visitors enjoy the natural setting of the state's shoreline. Aesthetically the beaches are a unique experience; and recreational, these areas are increasingly needed for boating, swimming, sunning, and fishing, as leisure time

and mobility continue to increase.

Beaches and dunes are nesting grounds for sea turtles and numerous bird species, several of which are endangered. The beaches and adjacent coastal waters are also habitat for many marine species.

Probably the most vitally important aspect of the beach and dune system is its contribution to storage of sand the shoreline stability. This system serves as a barrier which protects adjacent

inland areas, dissipating the energy of storm waves. The dunes are a source of sand to aid in the natural renourishment of the beach from the landward side.

The beach itself is relatively tolerate to normal recreational use such as walking or fishing. It is important, however, that enough room be allotted between structures and the shoreline so that if natural erosion occurs, natural deposition can restore the beach without the occurrence of property damage.

These same resources of beaches and dunes are desirable locations for habitation and recreation and are subject to intense development. It should be noted, however, that housing and commercial activity may not be compatible with the rapid changes which occur naturally on some beaches and dune areas due to erosion and the effect of hurricanes. Therefore, regulations to ensure sound development in the critical areas are essential to protecting the resources as well as

protecting lives and property."4 [For further findings and policies see IV 51-65. State of South Carolina Coastal Management Program (1979).]

As a result of the obvious adverse impact erosion control structures have on beaches, the Council has followed an increasingly tighter policy of avoiding hard structures on the beach and has encouraged moving them as landward as possible when a structure is permitted. This is supported by the policies of the Act and pertinent rules and regulations. Section 48-39-30 specifically provides that the Council must:

(B)(1) "Promote economic and social improvement of the citizens of this State and to encourage development of the coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safegaurds with respect to the construction of facilities in the critical areas of the coastal zone;

(B)(2) Protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations;"

In order to implement these policies, the Council has promulgated rules and regulations which clearly provide that the Appellants' permit application should be denied. These regulations are as follows:

(1) The Council will promote the use of natural features of the dune and beach system rather than artificial protection. [R.30-13(A)(1)(b)].

(2) Erosion control structures must not interfere with existing or planned public access unless other adequate access cannot be provided. [R.30-13(A)(1)(d)].

(3) All erosion control projects must consist of environmentally accepted materials, demonstrate sound design and construction so that they could reasonably be expected to be safe and effective and minimize adverse effects on the beach. [R.30-13(A)(1)(f)].

(4) Erosion control structures should not normally be approved except when erosion imminently threatens permanent improvements, including but not limited to buildings, paved parking lots, swimming pools, etc., which existed on the subject property ninety (90) days after the adoption of this regulation (September 27, 1981); or in the case of protecting property adjacent to existing erosion control structures; or, in the case of structures specifically called for in

an approved erosion control plan. [R.30-13(A)(1)(g)].

(5) All applications for construction of a seawall/bulkhead/revetment in the beach or sand dune critical areas for purposes of filling behind these structures for the creation of land for private or public development will be denied by the Council. [R.30-13(A)(1)(b)(i)].

(6) The Council must consider the cumulative effects of any project. [R.30-11(C)].

Applying the law and rules and regulations to the case at hand we find a permit application which seeks to advance a bulkhead on the dry-sand beach to these property lines for the purpose of erosion control. This is in violation of the law, policy and rules and regulations because:

(1) The Council is charged with the responsibility of promoting the natural features of dunes and beach systems rather than artificial protection.

(2) There is existing and historical public access laterally along the beach in front of the existing

wall which will be lost to the project.

(3) There is currently no erosion at the site and there are no permanent structures imminently threatened. While there is an adjacent erosion control device, that does not mean that an applicant can automatically move an existing seawall seaward to bring them in line with one another. In addition, the Council has always required that devices be on both sides of a proposed project in order to be eligible for construction.

(4) The project would have the effect of creating land for private use because filling behind the bulkhead would be required.

(5) Issuance of this permit could have a serious cumulative effect on this and other beaches by reclamation of critical area for private purposes.

In addition to the fact that the project would violate the clear intent of the rules and regulations, other factors supported the denial of the permit. First, the permit purpose can be met without issuing the permit. The

Petitioners have an existing wall at the site. Second, it was evident from the testimony that this beach is accreting and that the Council only issues erosion control devices where there is an immediate erosion problem. Third, the device as displayed on the plans would offer no greater relief than the existing walls in time of storm. Finally, the Council is taking a long range management view, relying upon the North Myrtle Beach Shorefront Management Plan which did not recommend placement of a wall at the site and the obvious problem of sea level rise.

The denial of the permit is a wise management decision only from the point of view of the purposes set forth in the Coastal Management Act of 1977. The Oil and Gas Act also supports the preservation of the beaches of the coastal zone and

speaks to the urgent need to give high priority to the natural system. There the General Assembly found and declared that the beaches should be maintained "in as close to a pristine condition as possible..." This comports with the decision to deny this permit and supports the conclusion made by the Council.

By way of the foregoing, it is clear that the Council is protecting a valuable resource and doing it in a manner consistent with the intent of the Coastal Zone Management Act to protect and wherever possible to restore significant natural resource critical areas. Thus, there is a substantial and legitimate state interest involved. Given the significance of the public purpose in preserving the beach critical area, the permit was properly denied by Council.

Issues of Prescriptive Rights, Implied Dedication, Custom and Usage, and Public Trust

Although I agree that the Coastal Council had the authority to deny the Beards' permit request, it is important to explain the reasons for that ruling, in light of the many theories put forth in the Final Administrative Order. My ruling is based solely upon the powers granted to the Coastal Council in the Act. Charged with a broad and difficult task in managing the coast of the State, the Act grants the Coastal Council reasonable powers to enforce the Act's provisions. Among these is the power to grant, deny and revoke permits. My ruling in this matter is based upon those powers of the

Council, granted by the Act, and as applied to the facts of this case.

In its Final Administrative Order the Coastal Council cited various other legal bases for its ruling. Due to the importance of these issues, I will briefly review them.

The Coastal Council proposed that the general public has a vested interest in the dry-sand beach up to the bulkhead line because the public has used, and the landowners have acquiesced to the usage, of the dry-sand beach. The Council specified several legal doctrines which it alleged support this theory. These included prescriptive rights, implied dedication, custom and usage, and an expanded Public Trust Doctrine.

The Council suggested that the public, through long and continued use of a dry-sand beach, acquired the rights of the landowner. The Council asserts that due to the public's use of the Grand Strand, and the entire coastline along the Atlantic Ocean, for various forms of recreation, the dry-sand beach of the Grand Strand, landward from the mean high tide designation to some landward obstruction, is now held in trust by the State of South Carolina for public purposes or has otherwise somehow passed to public ownership or control. As such, the Council contended that the private property owners' interests in this land have been superceded by the State's interest in maintaining the dry-sand beaches for public use.

I find that neither prescriptive easement, implied dedication, custom and usage or the Public Trust Doctrine as these theories are interpreted in existing South Carolina law, support the Council's contention that the Beards', or any of the dry-sand beach of the Atlantic coastline, is held in trust by the State of South Carolina for public purposes or is subject to some public right of usage superior to the landowners. Since these theories were never asserted by the Coastal Council as reasons to deny the Beards' permit at the administrative level, and only appeared in the Final Order, I find that they are not properly before the Court. Even if they are, I find them inapplicable to this case for the reasons set out below.

1. Prescriptive Easements

South Carolina has equated prescription with adverse possession and has required the use of land to be exclusive, continuous, uninterrupted, adverse, under a claim of right, and for a statutory period of 20 years, before prescription will deny the private property owner rights in his land. Watt v. Trapp, 31 S.C.L. 136 (2 Rich.) (1845). South Carolina courts also recognize "neighborly courtesy" and have been very cautious about granting the public rights in land which the landowner has graciously allowed the public to use. State v. Murphy, 1224 S.C. 274, 117 S.E. 529 (1923). The claimant must additionally produce evidence that the use was confined to a definite area and easement rights can be established only in the particular piece of property that is the subject of

the litigation. Babb v. Harrison, 220 S.C. 20, 66 S.E.2d 457 (1951).

There is no testimony in the record which indicates that any specific individual has enjoyed a continuous uninterrupted use, adverse to the Beards under a claim of right for a statutory period of 20 years. In fact, there is little, if any, testimony concerning public use of the Beards' property at all. Most of the testimony dealt with the Grand Strand in general. Nor is there any evidence in the record which could consequently extend this legal theory to the entire Atlantic coast. The Council's contention that a prescriptive easement in favor of the public exists on the Beards' or any dry-sand beach is unfounded and improper under existing South Carolina law and under the facts of this case.

2. Implied Dedication

Dedication is the devotion of land to a public use by an unequivocal manifestation of the fee owner that the property be accepted and used for such public purpose. In South Carolina, the burden of proof is on the party seeking relief, who must show that the property owner's conduct clearly, convincingly, and unequivocally indicates, expressly or by plain indication, the purpose of the intention to create a right in the public to use the land adversely to him as of right. Stone v. International Paper Co., 293 S.C. 138, 359 S.E.2d 83 (Ct. App. 1987).

To establish implied dedication in South Carolina, a claimant must also show

that the dedication was accepted in the recognized legal manner. Stone, 293 S.C. 138. Most previous South Carolina cases addressing this doctrine have involved the dedication of streets and highways to the public. These cases have specified that evidence that the public uses the property is not sufficient to imply dedication, rather, this evidence must be accompanied by an assertion of control over the street or highway by the municipality. Darlington v. Perkins, 269 S.C. 572, 239 S.E.2d 69 (1977). This showing is necessary because the creation of a public street or highway imposes a maintenance duty on the public, and the municipal authorities as the public's representatives must accept the duty.

The issue of implied dedication of sandy beaches has already been ruled on in

this State. In State v. Beach Co., 271 S.C. 425, 248 S.E.2d 115 (1978) our Supreme Court was faced with this same argument put forward by the State and determined that it did not have any application to the beaches in this State.

> "The real issue in the case is whether the public in general has acquired a permanent easement or prescriptive right of user over the area in question, which effectively prohibits sale or development of it by the owner of the fee simple title". 271 S.C. at 427. [Emphasis Added.]

The issue was also described as follows:

> "The [State] claims that the Beach Co.'s title is subject to...Easement By Dedication As May Exist." 271 S.C. at 427.

Although "custom and usage" and the public trust doctrine were not mentioned by name in Beach Co., it is clear that the issue of public use of private beach was squarely before the Court. In that case, the disputed area ran from the road all the way across the dry-sand beach to the high water mark of the Atlantic Ocean. As in the Beards' case, the property in dispute had been used by the public from time to time.

"Over the years property owners and others have traversed certain portions of the disputed property, going to and from the beach area...[S]uch use of the property as was made by the public was permitted by the owner". 271 S.C. at 421.

In holding that the public had no rights of a recreational easement on the owner's land the Court held:

"It is generally accepted that to constitute a valid dedication, there must not only be an intention on the part of the owner to dedicate a property to the

public use, but that such intention must be manifested in a positive and unmistakable manner... Absent an express gift, one who asserts a dedication must demonstrate conduct on the part of the landowner clearly, convincingly and unequivocally indicating his intention to create a right in the public...

Since we know that individual owners of property are not apt to transfer it to the community or subject it to public servitude without compensation, the burden

> of proof to establish dedication is upon the party claiming it...
>
> [P]roof must usually be strict, cogent, and convincing and the acts proved must be inconsistent with any construction other than that of dedication". 271 S.C. 425, 431, 432.

As such, the law in South Carolina does not support the Council's position that the Beards impliedly dedicated their land to the State, nor will it support the expansion of this doctrine to the entire South Carolina coast's dry-sand beach.

3. Custom and Usage

The Coastal Council's order also suggests that the Doctrine of Custom and Usage, if accepted in this State, would provide that the public had acquired rights int he dry-sand beach, over and against the private property owners' rights, through long usage. In support of this position, the Council's Final Administrative Order cited several "facts at hand:"

a. The public has used the Grand Strand beaches for general recreation for generations, up to the dune or vegetation line;

b. In this case, specifically, the public has regularly used the area of this lot up to the Appellants' bulkhead;

c. The recreational use at the Grand Strand area is uninterrupted;

d. Their use has been free and without dispute;

e. Recreational use at the beach is a reasonable, common use of the beach. The beach is suitable

to the recreational use;

f. The use has not been left to landowners but dictated by custom;

g. It is not repugnant to law and in fact supported by various acts of the Legislature.

In legal support of its contention, the Coastal Council cited an Oregon case, State ex rel. Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969) and Darlington v. Perkins, 269 S.C. 572, 239 S.E.2d 69 (1977). The Doctrine of Custom and usage

has not been recognized in any South Carolina case.

The Customs Doctrine was developed in England where the practice of a particular locality, although not written into the common law, could become the law of that place. Graham v. Walker, 78 Conn. 130, 61 A. 98 (1905). To achieve the statute of law, the custom "must have continued from time immemorial, without interruption, and as of right; it must be certain as to the place, and as to the person; and it must b e certain and reasonable as to the subject matter of rights created." The Case of Tanistry, Dav. 23, 31-32, 80 Eng. Rep. 156 (K.P.D. 1674). To be immemorial, the custom must have been exercised since "a time when the memory of a man runneth not to the contrary." 12 Harlsburg's Laws of

England, Custom and Usages (1975). This requirement has been construed to mean from the coronation of Richard I in 1189. Graham, 78 Conn. at 131. Several requirements must be satisfied to establish a custom; (1) the use must be ancient; (2) continuous; (3) peaceable; (4) free from dispute; (5) reasonable; (6) the area of use must be certain; (7) the landowner must be obliged to permit the use; and (8) the use must be consistent with other law. 1 W. Blackstone, Commentaries *75 through *78.

The application of the Custom Doctrine to the "facts at hand" provided by the Coastal Council raise significant logical and constitutional problems. Most American jurisdictions have refused to recognize custom rights in beach property or in any other property. Smith v. Bruce,

241 Ga. 133, 244 S.E.2d 559 (178); Department of Natural REsources v. Mayor of Ocean City, 274 Md. 1, 332 A.2d 630 (1975); Gillies v. Orienta Beach Club, 159 Misc. 675, 289 N.Y.S. 733 (N.Y. S.Ct. 1935); Graham, 78 Conn. 130. Several jurisdictions have held that because it is literally impossible for American custom to have existed since time immemorial, the Doctrine of Custom is inapplicable in America. Delaphane v. Crenshaw and Fisher, 56 Va. 880, 16 Gratt 457 (1860). Other jurisdictions have held that custom is obsolete doctrine because methods exist for recording rights in land. Gillie, 159 Misc. 675. Custom has also been noted to violate the rule against perpetuity. J. Gray, The Rule Against Perpetuity, §586 (4th Ed. 1942). Other courts have held that the rights of use in the public could not be established by custom because a

custom so general would be indistinguishable from the law itself. Albright v. Cartwright, 65 N.J.L. 330, 45 A. 634 (1900).

South Carolina has not previously recognized custom and usage, and the doctrine has been overwhelmingly rejected in other jurisdictions. Even if the Custom Doctrine was recognized in South Carolina, the Council has failed to place facs in the record to support the extinguishment of private property rights in the Beards' or any South Carolina dry-sand beach by custom. For example, the area of use is not defined nor is the use consistent with other law, specifically with long-recognized private property interests and constitutional rights. For all the foregoing reasons, the Coastal Council's reliance on the Custom Doctrine

to support its contention that the public interest in the recreational use of the dry-sand beach supercedes individual property owners' rights is improper.

4. The Public Trust Doctrine

The Coastal Council also advocated a broad expansion of the public trust doctrine. The Council contended that the traditionally recognized public trust lands should be expanded to include the dry-sand beach bordering the Atlantic Ocean above the Ban high water mark. The Council also advocated the extension of the doctrine to recognize a public interest in the recreational use of the tidelands.

The general South Carolina law regarding the public trust doctrine is set

out in Cape Romain Land and Improvement Co. v. Georgia Carolina Canning Co., 148 S.C. 428; 146 S.E. 434 (1928).

The South Carolina Supreme Court explained with regard to grants by the government of land bordering on tidewater;

> [i]t has been distinctly settled that they [the grants) only extend to high water mark, and that the title to the shore and lands under water in front of lands so granted enure to the state within which they are situated, if the state has been organized and established there. Such title to the shore and lands and water is

> regarded as incidental to the sovereignty of the state - a portion of the royalties belonging thereto and held in trust for the public purposes of navigation and fishery.

Cape Romain, 148 S.C. at 432. Thus, as developed in England, the public trust doctrine in South Carolina applies only to lands over which the tide ebbs and flows, commonly called the foreshore, which extends between the mean low tide and the mean high tide. Rice Hope Plantation, 216 S.C. 500.

In South Carolina, public trust lands are those covered by waters that are navigable by vessels or boats, employed in the ordinary course of water commerce.

The doctrine presently extends only to the public's right to navigate and fish in these areas. Rice Hope Plantation v. S.C. Pub. Serv. Auth., 216 S.C. 500; 59 S.E.2d 132 (1950). South Carolina has not recognized recreation as a proper public use of public trust lands.

The question raised by the Coastal Council is whether the public trust doctrine can be extended in this case to include the privately owned dry-sand beach that is only rarely covered by the tides. Attempts to expand the doctrine to include the dry-sand area of the beach were rejected at common law and have been rejected by most American jurisdictions. Attorney General v. Chambers, 4 De. Ge. M. and G. 206, 43 Eng. Rep. 486 (1854); Borax Consol. Ltd. v. City of Los Angeles, 296 U.S. 10, 56 S. Ct. 23, 80 L.Ed. 9 (1935).

The United States Supreme Court has rejected attempts by states to extend the landward boundary of the public trust lands. In Hughes v. State, 67 Wash.2d 799, 410 P.D. 20 (1966), rev'd sub nom., Hughes v. Washington, 389 U.S. 290, 88 S. Ct. 438, 19 L.Ed.2d 530 (1967), the Washington Supreme Court held that the landward boundary of the wet-sand area was the vegetation line and that state ownership extended to that line. The United States Supreme Court reversed the decision, finding that state ownership extended only to the mean high tide line. Citing its decision in Borax Consol. Ltd., supra, the court stated that the question of ownership of the tidelands is a federal question.

In South Carolina, the doctrine has always been narrowly

construed and, in fact, private property interests, when established by the proper burden of proof, have been held to be superior to the public trust. As such private ownership of public trust land has been specifically recognized by the South Carolina Supreme Court. Cape Romain, 148 S.C. 428.

The Coastal Council relied heavily upon several New Jersey decisions which have found that the public trust warranted recreational public use of the dry-sand area "subject to an accommodation of the interest of the owner." Matthews v. Bayhead Improvement Assoc., 95 N.J. 306, 325, 471 A.2d 355 (1984); Borough of Neptune City v. Borough of Avon by the Sea, 61 N.J. 296, 294 A.2d 47 (1972). Thus far, New Jersey is the only state to recognize any public trust interest in

privately-owned dry-sand beaches. The New Jersey courts have limited this application of the public trust doctrine to privately owned dry-sand beach to 1 1/4 mile of beach which was operated by its private owners as if it were a municipal beach.

The expansion of the public trust doctrine to the entire Atlantic Coast dry-sand beach is beyond the scope of New Jersey's aberrational construction of the public trust doctrine. To expand the public trust doctrine to encompass recreation as a public use, and to change the century old definition of public trust lands to include dry-sand beaches from the mean high water mark to the first landward obstruction, is unprecedented in any jurisdiction and certainly in South Carolina. As such, the Coastal Council's

position is unfounded and improper pursuant to existing South Carolina law.

Therefore, I find that the extinguishment of private property rights, in the dry-sand beach under a prescriptive easement, an implied dedication, a custom and usage or a public trust doctrine theory would violate existing South Carolina law. This violation would occur whether the entire Atlantic Coast shoreline is involved or merely the Beard's property which is the subject of this dispute. Moreover, even if we were to adopt one of these doctrines in support of the Coastal Council's contentions, a "taking" without just compensation would result. If one of these doctrines was adopted, it would necessarily apply to the coast of the entire state and, thus constitute a mass taking of the state's

entire dry-sand beach. I am not willing to adopt that position.

The "Taking" Issue

Having determined that the Coastal Council was within its rights to deny the Beards' permit request, we est now determined the impact of that denial on the Beards Property. They have alleged that such a denial would constitute a governmental "taking" contrary to the provisions of both the South Carolina and United States Constitutions.

What Constitutes a "Taking"

A governmental taking of a citizen's privately owned property, in its most obvious sense, would involve the government's actually taking physical

possession of that property, to the exclusion of the owner. These cases could involve such instances as the government seizing supplies in time of war, or building public improvements, such as roads, on private property. In such instances there is no question that the government must pay compensation under the applicable constitutional provisions. Most cases involving such actions are resolved under the eminent domain statutes and revolve on the issue of value and damages.

Aside from these cases in which physical possession is openly and clearly taken by the government, there are other circumstances which may lead to a judicial finding that a "taking" has occurred. It is in that sense, and on that body of law, that the Beards rely.

1. South Carolina Decisions

The South Carolina courts have been among the leaders in the nation in protecting private citizens against "inverse condemnation", or a "taking" that does not involve actual physical possession of the property by the government. At least as early as 1933 the State Supreme Court was faced with a question relating to an alleged taking by virtue of governmental over-regulation of private property. In the case of Henderson v. City of Greenwood, 172 S.C.9 16, 172 S.E. 689 (1933), the court reviewed a situation involving zoning regulations passed by the City of Greenwood. In that case the court held that if a law deprives an owner of "one of its essential attributes, or hampers the

owner in the application of it to the purpose of trade, or imposes conditions upon the right to hold or use it"... it would constitute an unconstitutional taking of that land.

It has been repeatedly held that property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal. Anything that destroys one or more of these elements destroys the value of the property and "ownership is rendered a barren right" Gasque v. Town of Conway, 194 S.C. 15, 32, 8 S.E.2d 871 (1940).

In looking at the question of "what constitutes a taking" we can be guided to a large degree by previous rulings in the State Supreme Court. Our court has taken a very protective position

relative to private property and "has previously adopted and adhered to the broadest possible view of what is a taking . . . Kline v. City of Columbia, 249 S.C. 532, 155 S.E.2d 597 (1967). Although each case must be decided on its own merits, it has been held that there is a taking of the owners property with any act done which substantial y restricts or abridges the right of owner". James v. City of Greenville, 227 S.C. 565, 88 S.E.2d 661, 667 (1955).

In trying to give meaning to this "broadest possible view" the court has found a taking in a wide variety of circumstances. Among these have been the flooding of private property, Lindsay v. City of Greenville, 247 S.C. 232, 146 S.E.2d 863 (1966); Chick Springs Water Co. v. State Highway Dept., 159 S.C. 481, 157

S.E. 842; negligent highway construction, Greens v. S.C. Highway Dept., 239 S.C. 44, 121 S.E.2d 240 (1961); restrictive zoning ordinances, Henderson v. City of Greenwood, supra, James v. City of Greenville, supra, ordinances relating to hours of operating a business, Painter v. Town of Forest Acres, 231 S.C. 56, 97 S.E.2d 71 (1957); and the substitution of salt water flooding for fresh water flooding, Farly v. S.C. Public Service Authority, 228 S.C. 392, 90 S.E.2d 472 (1955).

Each of these cases has upheld the basic rulings of Henderson and Gasque in holding that "there may be a taking of property in the constitutional sense although there has been no actual entry . . . and no artificial structure has been erected upon it". Lindsay, supra.

As recently as 1984 the refusal by the City of Hanahan to allow a property owner fill a portion of her property was deemed to be a taking. Hill v. City of Hanahan, 281 S.C. 527, 316 S.E.2d 681 (Ct. App. 1984).

The Coastal Council cites the case of Carter v. S.C. Coastal Council, 281 S.C. 210, 314 S.E.2d 327 (1984) as authority for the proposition that no "taking" has occurred. The Carter case is clearly distinguishable on its facts. In that case, the landowner was attempting to build a bulkhead in a flooded marsh and change the character of his property from flooded land to dry land. This is not the case here. The record reveals that the sand on the seaward side of the existing seawall is generally the level equal to

that on the back of the bulkhead. The Beards are not trying to change the character of their land as in the Carter case.

Federal Court Decisions

In addition to these state court interpretations of the "taking clause" it is also necessary to look to the rulings of the federal courts on questions relating to the United States Constitution. Most of the federal court cases dealing with a regulatory taking follow the same line of reasoning as the South Carolina courts. The United States Supreme Court has often spoken on the same question. It too has held that there is "no-set formula [existing] to determine, in all cases, whether compensation is constitutionally due for a government

restriction of property." Loretto v. Teleprompter, 458 U.S. 419, 426, 102 S.Ct. 3164, 3171 (1982).

> "Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it'. United States v. General Motors Corp., 323 U.S. 373, 65 S.Ct. 557 (1945) . . . The power to exclude has traditionally been one of the most treasured strands in an owner's bundle of property rights." 458 U.S. at 435, 102 S.Ct. at 3176.

Several recent cases bear a similarity to the facts of the case before

us. Kiser Aetna v. United States, 444 U.S. 164, 100 S.Ct. 383 (1979) involved an effort by the U.S. Army Corps of Engineers to enforce public access to a privately owned marina. Its theory was that since the marina had come under the jurisdiction of the Corps of Engineers by virtue of its navigability, it would also be subject to public access. The Supreme Court held that the government could not impose such an easement on the private property without paying compensation. In the case before us all of the parties concede that the contested property is within the jurisdiction of the Coastal Council, but it does not necessarily flow from that position that the public has a right to access of the Beard's property.

"In this case we hold that the 'right to exclude', so

> universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation . . . And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation. Kiser Aetna, 444 U.S. at 179, 180, 100 S.Ct. at 393.

In First English Evangelical Lutheran Church v. County of Los Angeles, ___ U.S. ___, 107 S.Ct. 2378 (1987) the Supreme Court faced a case in which the local government was prohibiting the

rebuilding, or building, of improvements in a flood prone area. In this regard it is similar to the Coastal Council 's prohibition of the Beards proposed bulkhead. The ruling by the Supreme Court in that case can provide some guidance in ours.

> "We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of the self executing character of the constitutional provision with-respect to compensation." ___ U.S. at ___, 107 S.Ct. at 2386.

In its discussion of the applicability of the "taking" clause of

the Constitution to temporary takings, the Court said:

> "It has also been established doctrine at least since Justice Holmes' opinion for the Court in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922) that '[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." ___ U.S. at ___, 107 S.Ct. at 2386.

In its discussion of the applicability of the "taking" clause of the Constitution to temporary takings, the Court said:

> "It is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole". ___ U.S. at ___, 107 S.Ct. at 2388.

The First English case reaffirmed the Supreme Court's long held position on inverse condemnation and governmental

regulation which parallels the holdings of our State Supreme Court. Seventeen days later the Supreme Court applied those principals to a case very similar to the Beards'. The case of Nollan v. California Coastal Commission, ___ U.S.___, 107 S.Ct. 3141 (1987) bears such striking similarities to the Beard's case that it bears detailed review.

James Nollan and his wife owned a beachfront lot in Ventura County, California. On his property, but landward of his oceanside property line, was a concrete seawall. The effect of the seawall was to divide his lot into two areas, that lying landward of the seawall and the other lying seaward of the seawall and extending to his property line. That latter portion was on the beach, but was privately owned. In this regard the

situation is virtually identical to the case before us.

The Nollans sought a permit to construct a house on their lot, in much the same way that permits are required by the South Carolina Coastal Council for work done within the critical area. The Coastal Commission allowed issuance of the permit, but with the condition that the Nollans grant the public an easement over the portion of their private property lying seaward of the seawall. Contesting this condition, the Nollans engaged in full evidentiary hearings before the Coastal Commission, following which that administrative agency upheld the condition.

"Had [the State] simply required the [landowner]

to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house or their agreeing to do so, we have no doubt there would have been a taking. To say that the appropriation of a public easement across a landowners premises does not constitute the taking of a property interest but rather 'a mere restriction of its use', . . . is to use words in a manner that deprives them of all their

ordinary meaning".

Nollan, ___ U.S. at ___,

107 S.Ct. at 3145.

[Emphasis added.]

Since public use or public access to the Beard's property is apparently the only real reason for denying their permit, this holding would seem to be directly applicable to our facts.

As the Nollan court continued to explore the inverse condemnation claim in that fact situation it reiterated the law as set out previously in its own decisions and enunciated in those of this State.

"We have repeatedly held that, as to property reserved by its owner for private use, 'the right to

exclude [others is] one of the most essential sticks in the bundle of rights that are commonly characterized as property'." ___ U.S. ___, 107 S.Ct. at 3145.

[W]here governmental action results in '[a] permanent physical occupation' of the property . . . our cases uniformly have found a taking to the extent of the occupation, <u>without regard to whether the action achieves an important public benefit or has only minimal economic impact on the</u>

owner. [Emphasis added.] . . . We think a 'permanent physical occupation' has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, . . . even though no particular individual is permitted to station himself permanently upon the premises". Nollan, ___ U.S. ___, 107 S.Ct. at 3145.

"[R]equiring uncompensated conveyance of the easement outright would violate the Fourteenth

Amendment . . . " 107 S.Ct. at 3146.

The Nollan Court concluded its opinion with this observation.

"California is free to advance its 'comprehensive program if it wishes, by using its power of eminent domain for this 'public purpose'. . . but if it wants an easement across the Nollans' property, it must pay for it". Nollan, ___ U.S.___ 107 S.Ct. at 3150.

In applying the facts of this case, as set out in the record, to the law

of inverse condemnation in general, and the recent Supreme Court rulings in particular, several facts come to light. It is apparent in its Order that the Coastal Council relied almost exclusively on the lack of public access that the proposed seawall would impose on the portion of the Beards' Property lying between the existing seawall and the proposed seawall. In the 39 page Order issued by the Coastal Council there are no fewer than 21 separate references to the State's support of public use of the Petitioners' land and the State's efforts to prevent interference with the public use. Among those are the following statements:

"It finds that the appropriate use for the 4,300 to 4,400 square feet

of beach impacted by this project is that of public recreation." p. 17.

"Here, the private use of dry sand beach is inconsistent with the common good." p. 30.

The essence of the Order is that the Coastal Council is concerned that, if the proposed seawall is built, the public wall will be excluded from the Beards' property. If there is any question of that fact it should be dispelled by a reading of the following question and answers from the transcript of the administrative hearing. The questioning was of the Coastal Council's Permit Administrator.

"Q. So your concern here was that the Beards might somehow keep the public from using the Beard's property.

A. Keep them from using the beach they own; that's right.

Q. But the way you have interpreted this Act now . . . the only use for that property now is as a public

beach, is that correct?

A. I think that is one of the primary uses we look at it as. It is the dry sand beach; it's a public beach."

Based upon a close review of the record from the administrative proceeding it is evident that a denial of the Beards' permit request would have the effect of turning a portion of their privately owned property into a "public beach". It is equally evident that this is the purpose of the permit denial. I have previously held that such as denial is within the police power of the State and the Coastal

Council under its enabling legislation. I find, however, that such a denial has the effect of depriving the Beards of their unrestricted right to use their property, the unrestricted right to enjoy and dispose of their property and the right to exclude others from their property. I, thus, find that the denial of the Beards' permit constitutes a governmental "taking" of their property lying between the existing seawall and the purposed seawall, in violation of Article I, Section 13 of the South Carolina Constitution and the Fifth Amendment of the United States Constitution.

The court recognizes the difficult position in which the Coastal Council finds itself in attempting to implement a plan for coastal development that also makes sense environmentally. That

realization, however, does not mean that the State can force those citizens that own oceanfront land to shoulder the burden for the entire State. The United States Supreme Court best expressed these same thoughts in the First English case:

> "We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land use planners and governing bodies . . . But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provision of the Constitution are designed to limit the flexibility

and freedom of governmental authorities and the Just Compensation a clause of the fifth Amendment is one of them . . . [A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the chance". ____ U.S. at ____, 107 S.Ct. at 2389.

To further paraphrase the opinion in the Nollan case:

"[The State] is free to advance its 'comprehensive

> program' if it wishes, by using its power of eminent domain for this 'public purpose' . . . but if it wants an easement across the [Beards'] property, it must pay for it." Nollan, supra, 107 S.Ct. at 3150.

Based upon the foregoing, it is;

ORDERED, that the Coastal Council's motion for partial dismissal is denied;

FURTHER ORDERED, that the administrative decision of the Coastal Council denying the Beards' request for a permit to construct a new seawall is hereby affirmed;

FURTHER ORDERED, that the denial of the Beards' permit request constitutes a "taking" by the State of the Boards' property between the existing seawall and the proposed seawall, in violation of Article I, Section 13, of the South Carolina Constitution and the Fifth Amendment of the United States Constitution.

FURTHER ORDERED, that the Beards' request for an award of reasonable attorney's fees and costs for this action pursuant to §28-11-30(3) Code of Laws of South Carolina, 1976, as amended shall be deferred and heard at the damage hearing described herein.

FURTHER ORDERED, that the question of the amount of damages and reasonable attorney's fees shall be determined at a

subsequent trial before this court in the same manner as other condemnation proceedings under the laws of this State.

JAMES E. MOORE
Presiding Judge
Fifteenth Judicial Circuit

Greenwood, South Carolina

September 8, 1989.

91-187 (3)

Supreme Court, U.S.
FILED
JUL 16 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. _____

ROBERT AND ALICE BEARD,

Petitioners,

v.

SOUTH CAROLINA COASTAL COUNCIL, SIERRA CLUB, CHARLESTON NATURAL HISTORY SOCIETY AND SOUTH CAROLINA WILDLIFE FEDERATION,

Respondents.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA VOLUME 2

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TABLE OF CONTENTS
TO THE APPENDICES TO
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF SOUTH CAROLINA

Opinion of the Supreme Court of South Carolina, Opinion No. 23363, Heard June 1, 1990, filed March 11, 1991 . . . . . Appendix A.1

Dissenting Opinion of the Supreme Court of South, Opinion No. 23342, Heard April 2, 1990, filed February 11, 1991 . . . . . Appendix A.2

Final Order of the Fifteenth Judicial Circuit, State of South Carolina, Case No. 88-CP-26-3503, dated September 8, 1989 . . . . . Appendix B

Final Administrative Order of the South Carolina Coastal Council, Heard July 15, 1988 . . . . . Appendix C

Final Order of the Supreme Court of South Carolina, Robert and Alice Beard v. S.C. Coastal Council, et al., dated April 17, 1991 . . Appendix D

S.C. Code Ann. §§48-39-10 to 39-220 (1976) (Beachfront Management Act) . . . . . Appendix E

FINAL ADMINISTRATIVE ORDER

Oral arguments in this matter were heard before the full South Carolina Coastal Council on July 15, 1988. Previously an administrative hearing was held before Helen E. Clawson, Hearing Officer on January 13, 1988, pursuant to Section 48-39-140 and Section 1-23-310, et. seq., of the Code of Laws of South Carolina, 1986, as amended, and R.30-6 of the Rules and Regulations promulgated pursuant to the Coastal Management Act. This is an appeal from a staff decision to deny a permit to Robert O. and Alice O. Beard, P/N CC-87-084. The Appellants applied for a permit to construct a seawall approximately 205' in length across four lots on front beach in North Myrtle Beach, South Carolina. By way of a letter dated March 30, 1987, the South Carolina Coastal Council staff, through its Permit Administrator, Steve Moore,

sent the applicant a letter setting forth specific grounds for the denial, it being the opinion of the Permit Administrator that issuance of such a permit would be in violation of the Coastal Management Act, the Coastal Management Program, and the Rules and Regulations promulgated thereunder.

The permit as requested would move an existing bulkhead on the southern two lots 18.5' seaward. On the third and fourth lots a bulkhead would be brought forward approximately 23.9'. As pertains to the fourth and most northern lot, there currently exists no bulkhead. The permit in effect would advance a bulkhead seaward to the property line.

STATEMENT OF CASE

Robert and Alice Beard own Four lots on front beach in North Myrtle Beach, South Carolina. They are located at 5202, 5204,

5206 and 5208 North Ocean Boulevard in the Cherry Grove Section of North Myrtle Beach and are referred to as lots 2, 3, 4, 5, respectively and according to a drawing submitted with a permit application, the lots are uniformly 50' wide and 125' deep. Appellants purchased lot two in 1970, lot three in 1966 or 1967, lot four in 1961 and lot five in 1980. Lots two and three contain a four unit apartment dwelling, lot four has a single-family dwelling and lot five has a two-family dwelling upon it. According to the testimony of Mr. Beard, a bulkhead across lots two and three was built in 1971 and a bulkhead was built across lot four in 1961. It appears that a wall existed at one time on lot five but it has deteriorated to a state that it no longer exists and has not existed for a number of years. Subsequent to the December storm of 1986 and January

storm of 1987, the Appellants applied for a permit, P/N CC-87-084, seeking to construct a bulkhead/seawall approximately 205' in length across the four lots at the property line and in line with the existing seawall on lot one as so designated on the submitted plat. Lot one is owned by the Hartford Motel and is immediately to the south of lot two which is owned by the Appellants.

The permit as applied for would move the existing wall on lots two and three approximately 18.5' forward. On lot four the seawall would be brought forward approximately 23.9' and as to lot five, the permit requests construction of an entirely new wall consistent with the movement forward of the wall on the other lots. The permit if granted would advance the bulkhead seaward to the property line into an area that is characterized as dry

sand beach used by the public. According to the permit application, the work, as proposed and shown on the attached plans consists of constructing the bulkhead/seawall of timber and would be built at an elevation of +8 mean sea level. The Appellants propose that approximately 2,270 cubic yards of fill material would be placed behind the wall. The purpose stated for the project is erosion control.

While the stated purpose of the project is erosion control, the Appellants testified that this purpose was not altogether accurate. Mr. Beard testified that the real purpose of the proposed project was to add protection to all of his property in the belief that he could not sell that portion beyond the existing bulkhead line. In addition to protecting his right to the property up to his

property line, he wanted to provide increased storm protection for the habitable structures located on the landward portion of the lots. Mrs. Beard testified that the primary purpose of the project was to protect the habitable structures all of which sit on piling above the ground. These houses are approximately 30' from the existing wall which crosses three of the lots. Mrs. Beard, together with the expert appearing on the Appellants behalf, also testified that the proposed project would serve the purpose of reducing the buildup of sand on the lots.

According to testimony from the Appellants, a January 1, 1987, storm removed sand in front of the wall to a depth of about three feet from the top and the sand loss was more pronounced in the area adjacent to the Hartford Motel wall.

By March, however, the sand had built back approximately one and one-half feet, reflecting the fact that the beach was recovering from the erosion resulting from this storm. It is clear that this beach is accreting and according to the testimony of Mr. and Mrs. Beard, in their experience the buildup has continued unabated for approximately 25 years. The Appellants have in fact removed sand from behind the existing walls and in front of their walls because a dune was being formed by the natural action of wind and wave. The removal of the excess sand was primarily a result of the concern of the Appellants that their tenants would lose access to the beach or have to walk through or over a dune to get to the beach. Mrs. Beard believes that the buildup of sand threatens the rental rates

because people do not want to walk uphill to get to the beach.

Dr. Billy Edge testified as an expert in the area of beach processes and beachfront management on behalf of the Appellants. He testified that he visited the site twice for the purposes of evaluating the acceptability of a seawall in front of the Beard property. According to Dr. Edge, the area is accreting and the evidence since 1955 is adequate to form a long term projection that the proposed seawall would not have any negative impact on the beach in front of or adjacent to the site. He testified that he did not feel there was any imminent threat to any structure on the site and that the purpose of the wall was to provide protection only during rare storm events and to prevent wind blown sand from continually moving onto the Beard property. He testified,

however, that he did not recall the dimensions of the wall.

Dr. Edge cited the loss of dry sand beach to public use as being the only negative impact of the project. This loss would occur in the area behind the proposed wall. He stated that the public uses such areas and that the cumulative result of similar permits in the North Myrtle Beach area would be significant. He agreed that the beaches of the state have a very major impact on our economy.

Christopher P. Jones testified on behalf of the South Carolina Coastal Council as an expert in coastal engineering, specifically dealing with coastline processes and shorefront management. He testified that the area in question is accreting as a result of the presence of Hog Inlet to the north of the site, this being the cause of most

shoreline dynamics in the immediate area. The inlet benefits the site because the Appellants' property is protected by the shoals of the inlet which generate the accretion. Further down past the Beard property into the Cherry Grove section, the beach erodes at the rate of one to two feet per year. The Beard property is in a transitional area between the beach directly sheltered by the shoals and the erosional beach further south. The site exhibits a long term trend of gradual accretion. He testified that the proposed structure would not adversely affect the dynamics of the beach except possibly during storm conditions. During storm conditions the Beards may experience erosion at the site for short periods of time not unlike what occurred during the winter storm of 1986 and 1987.

Continuing his testimony, Mr. Jones concluded that there is no engineering advantage to the proposed bulkhead/seawalls as proposed and due to the elevation as indicated on the drawings attached to the permit application there would be no more protection for the lots from the proposed wall than the existing walls on the site. These walls are not storm surge devices in the sense that they could withstand major storm events or hurricanes, but are primarily intended to protect against gradual erosion and less significant storms. Furthermore, waves could reach the upland property from the north because no wall exists at lot five or beyond. While there are no significant engineering gains to the Appellants from the project, placing the wall further onto the beach would make it more vulnerable to wave attack.

Mr. Jones visited the site on several occasions and determined that the area in front of these walls is subject to wave action. According to available information, there is average availability of dry sand beach on the order of 50' to 75' in front of the Hartford wall. Beach profiles reviewed showed that the dry sand beach in front of the Hartford wall varied from twenty to one hundred feet during the course of a year. The dry sand beach or the area above the limits of runup or mean high water is smaller in the winter than it is in the summer because of the seasonal effects of storms. However, even during the summer visit in 1987, the runup came within 20 feet of the Hartford wall.

It is clear that the mean high water mark fluctuates and that the public use of the beach is dictated by the limit of wave runup. The public in general uses all

areas of the beach up to the landward most barrier, in this case to the walls located on the Beard property. The public use of dry sand beach shifts during movement of the tide and the project as proposed would affect the availability of 4,300 to 4,400 square feet of recreational beach to the public.

Mr. Jones concluded that it is unwise to move walls forward on the beach as it reduces the area available for public use and as stated above, makes the seawall/bulkhead more vulnerable to storm attack. If the purpose of the permit is erosion control, then the better solution for this beach is nourishment. Since the Council does not have that option available because the City of North Myrtle Beach has not agreed to enter into a renourishment program sponsored by the Army Corps of Engineers, then the only

option left open to the Council is to limit the placement of bulkheads/seawalls on the beach or to remove them as far away from the wave action as possible.

In assuming that the Council follows a policy of allowing people to move seawalls forward, Mr. Jones stated that for every foot that existing structures are moved out onto the beach along the North Myrtle Beach shoreline that approximately 1/3 to 1/2 an acre of dry sand beach would be lost. In terms of how many people use an acre of beach, he testified that in his shorefront management work he estimates that 100 to 200 square feet of beach is necessary for each person to have a visit. The cumulative impact of moving walls out onto the beach in the North Myrtle Beach area would be the loss of available dry sand beach to thousands of people. Since the economy of the Grand Strand is driven

by the existence of a dry sand beach, there is a significant interest in discouraging projects such as the Beards'.

Based upon the fact that the beach is stable, that there is no real engineering benefit to be gained by moving the walls forward on the beach and that public use of the beach would be severely impacted, his recommendation would be not to build the project. If erosion control is a real need, he recommended nourishment as the most appropriate solution.

Mr. Steve Moore, Permit Administrator, testified that the Council allows only two types of projects in the beach critical area, that being walkovers across sand dunes for beach access and erosion control projects. Thus, if the purpose of the project serves reasons which are not related to if the purpose of the project serves reasons which are not related to

erosion control or access, it is not appropriate or sufficient to support the issuance of a permit. The Coastal Council will not allow a person to place a bulkhead or seawall in the beach critical area for the purpose of enhancing the salability of their property or for the purpose of keeping sand off of a lot.

Mr. Moore denied the application because there are existing erosion control structures on the site and there is no erosion problem. In addition, Council regulations require that the upland property be imminently threatened by erosion or that the area be adjacent to existing erosion control structures. All testimony received from the experts recognized that the upland structures are not imminently threatened, and clearly there is no erosion control structure to the north for several lots. In any event,

even if circumstances warrant the issuance of a permit for an erosion control structure which may be adjacent to another such structure, the Council does not automatically allow an individual to move erosion control structures forward on the beach. Such is the case here.

In addition, Mr. Moore consistently applied the requirements [see R.30-13(A)(2)(b)(i)] which states that:

> "All applications for construction of a seawall/bulkhead/revetment in the beach or sand dune critical areas for purposes of filling behind these structures for the creation of land for private or public developments shall be denied by the Council, unless there is no feasible alternative."

Mr. Moore testified that he considered that the backfill, which would be needed behind the proposed wall, would in effect create land and remove from public use the area behind the proposed wall.

Mr. Moore also testified that he was concerned about the cumulative impacts of such a project in that if the Council started issuing permits for people to go out to their property lines, construct a bulkhead and fill those areas behind erosion control structures that it would have a very significant impact on the beachfront of South Carolina. The impact in his opinion would be the loss of recreational dry sand beach for public use. The public uses all of the dry sand beach until a barrier is reached and in this case it is clear that the public uses the area in front of the existing walls for public recreation.

Mr. Moore testified that the area of dry sand beach which would be lost if the proposed project were permitted would be approximately 4,300 to 4,400 square feet. While this area in and of itself may not

be significant, from a cumulative impact point of view, this project if permitted, could result in many similar applications up and down the coast. As a result, Mr. Moore testified that the Council has never permitted, in his recollection, a similar project in the Grand Strand area.

Mr. Moore also concluded that the stated purpose, erosion control, can be met by alternatives other than moving the walls forward to be in line with the wall in front of the Hartford Motel. First, the need for a wall on three of the lots is already met by the existence of the structures present on the lots. Secondly, the Council has a preference for soft solutions on the beaches and in fact, the Beards testified that there is so much sand on the lot that they have to remove it by shovel and wheelbarrow. Thirdly, the Beards have a right to place a wall on

lot five at a point beyond the critical area line.

The Council in denying the project, is placing a significant emphasis upon preservation of the dry sand beach for public use whether or not the dry sand beach is publicly or privately owned. The public has used such areas since time immemorial, and removal of these areas, could impact tourism dependent upon the existence of a dry sand beach. Based upon this fact, the Council has become more strict over the years regarding the issuance of permits of erosion control devices which affect the dry sand beach resource. The Council is concerned about public use and preservation of long range public and private interests which are dependent upon the beach resource. Mr. Moore testified that he has the following concerns. First, the issuance of a

bulkhead/seawall permit generally results in the proliferation of other similar structures. Second, the placement of such walls eliminates sand from the natural system (this sand is locked up behind the walls). Third, the North Myrtle Beach Shorefront Management Plan indicates the ideal dune line in fifty years is very much landward of where it is today. Finally, he was concerned with the long range prospect of sea level rise and the fact that twenty-five years of accretion may not be a permanent and continuing phenomenon at the site.

It is clear that the Council is reluctant to issue permits for erosion control structures, and does so only as a last resort. The Act requires that the Council weigh the public benefit or public harm against the private interest benefit obtained through a permit. The Council

has concluded that the dry sand beaches, as much as possible, should be preserved and maintained for public use inasmuch as long-term private interest in preserving the coastal economy is identical to the long-term public interest of preserving the dry sand beach resource for recreational use.

Donald Bellamy, a South Carolina Wildlife and Marine Resources employee who has lived in the Myrtle Beach area all his life, testified that the public uses the North Myrtle Beach dry and wet sand beach for recreation, and as stated by the other witnesses, this use extends to the first landward barrier. In addition to normal uses, the City of North Myrtle Beach continues to allow the customary use of the beach by vehicular traffic.

In the final analysis, the testimony was replete with statements about the

importance of the dry sand beach in front of Mr. Beard's existing walls, that this area is used by the public, and that the cumulative impact of the loss of such beach is significant to the public interest. On the other hand, testimony from all parties is that the area in front of the Appellant's walls is very gradually accreting, that there are no habitable structures imminently threatened, that the purpose of the project can be met without construction of the proposed bulkhead/seawall, and that no real benefit will flow to the Beards other than reclamation of approximately 4,300 to 4,400 square feet of recreational beach. The only evidence submitted indicates that the Appellants will receive no greater protection from storm or wave action by relocation of the walls beyond their existing location and that there are no

other purposes which would be legally served by such a project.

FINDINGS OF FACT

In addition to the foregoing, the Council finds as follows:

It finds that the Appellant/Permittees own four oceanfront lots in the Cherry Grove section of North Myrtle Beach, Horry County, South Carolina. There are bulkheads on three of the lots, however, on the northern most lot there no longer exists a bulkhead. A permit was applied for to move the existing walls on Lots 2 and 3 approximately 18.5' forward. On Lot 4 the seawall would be brought forward approximately 23.9' and as to Lot 5, the permit would require construction of an entirely new wall.

It finds that the Appellant/Permittee has the following purposes for the project:

1. To move the walls out to the property lines in order to ensure that he could sell that portion.

2. To provide increased erosion control protection for the habitable structures from storm events.

3. To reduce the buildup of sand on the lot in order to provide easier access for the tenants.

It finds that the beach in this area is gradually accreting.

It finds that the average availability of dry sand beach in front of the proposed walls is 50 to 75 feet, however, the dry sand beach in front of the Hartford wall varies from 20 to 100 feet during the course of the year. In addition, water does reach the face of the existing structures on the Beard property during some times of the year.

It finds that the Appellants will not be significantly impacted by having this permit denied for the following reasons:

1. The purposes for which the project is being built can be met by other means except for the desire of the Appellants to reclaim land by bulkheading and backfilling to their property lines.

2. There will be no significant increase in protection to upland structures against storms or wave action as a result of moving the walls forward as envisioned under the permit.

3. If in fact the purpose of the project is erosion control, then leaving the wind driven sand in place affords natural protection which is the best form of beach nourishment.

4. It is clear that the beach has recovered from the 1986-1987 winter storms and will continue to recover rapidly even after other storm events, so that there are no significant engineering problems as a result of having the Hartford Inn wall 18' in front of the wall on Lot 2.

5. There was no evidence presented to clearly demonstrate that the Appellants will be adversely impacted economically by the denial of this permit. While the Appellants stated that they believe that real income may be impacted as a result of the loss of beach access, this access is available without construction of this project.

It finds that the value of the dry sand beaches, including the one in question, is

immeasurable in terms of recreation and support of the tourist industry in the Grand Strand area.

It finds that both the program document and the rules and regulations find substantial value in the dry sand beach. R.30-1(B) sums up the findings concerning the value of this resource most succinctly, as follows:

> Each year millions of South Carolina citizens and visitors enjoy the natural setting of the state's shoreline. Aesthetically the beaches are a unique experience; and recreationally, these areas are increasingly needed for boating, swimming, sunning, and fishing, as leisure time and mobility continue to increase.
>
> Beaches and dunes are nesting grounds for sea turtles and numerous bird species, several which are endangered. The beaches and adjacent coastal waters are also habitat for many marine species.
>
> Probably the most vitally important aspect of the beach and dune system is its contribution to storage of sand and the shoreline stability. This system serves as a barrier

which protects adjacent inland areas, dissipating the energy of storm waves. The dunes are a source of sand to aid in the natural renourishment of the beach from the landward side.

The beach itself is relatively tolerant to normal recreational use such as walking or fishing. It is important however, that enough room be allotted between structures and the shoreline so that if natural erosion occurs, natural deposition can restore the beach without the occurrence of property damage.

These same resources of beaches and dunes are desirable locations for habitation and recreation and are subject to intense development. It should be noted, however, that housing and commercial activity may not be compatible with the rapid changes which occur naturally on some beaches and dune areas due to erosion and the effect of hurricanes. Therefore, regulations to ensure sound development in the critical areas are essential to protecting the resources as well as protecting lives and property."4 [For further findings and policies see IV 51-65, State of South Carolina Coastal Management Program (1979).]

It finds that the Council has balanced the need to preserve public access in and

to the area against the private interests of the Beards for reclamation of the area.

It finds that the staff made adequate factual determinations concerning the detrimental impact of erosion control structures on the beach and upon public use of the area in question. The staff had access to shorefront management documents and other information together with a policy position of the Council which existed at the time that this permit came under consideration. The policy of the Council at this time is one of moving erosion control structures landward or limiting their construction as much as possible.

It finds that the Permit Administrator has not been arbitrary and capricious in that he has followed the policies set forth in the Act, the rules and regulations, and the precedent of the

Council in a logical and fair manner. He has treated the Appellants similarly to other persons so situated.

It finds that the Permit Administrator followed all appropriate provisions of the Coastal Management Act and the Rules and Regulations promulgated thereunder and that the Council generally promotes the natural features of the dune and beach system rather than artificial protection. In addition, this project would interfere with existing public access which cannot be replaced by the appellants.

It finds that this project would significantly violate R.30-13(A)(1)(g) in that there are no permanent improvements on the lots which are imminently threatened by erosion, that the property is not between existing erosion control structures, but is adjacent only to a structure on the south, and that there is

no approved erosion control plan that would allow for the building of such structure.

It finds that the project will have the effect of creating land for private use, because filling behind the bulkhead would be required. This is directly in contravention of R.30-13(A)(1)(b)(i).

It finds that the permit would have a serious cumulative effect on the dry sand beach critical area and seriously threaten the recreational use of such areas and the tourist economy generated by this resource.

It finds that Rule 30-13 requires the Council to consider cumulative impacts.

It finds that the general private interest is the same as the general public interest in that preservation of the dry sand beach means preservation of the coastal economy. Appellants contends that

will be affected, however, it is clear that he will continue to have the use of the recreational dry sand beach.

It finds that Council, even when it does issue a permit for an erosion control structure which exist adjacent to other structures, does not normally move walls forward onto the beach in order to bring them in line with an existing structure.

It finds that the appropriate use for the 4,300 to 4,400 square feet of beach impacted by this project is that of public recreation.

It finds that the Appellants would be required to change the natural character of this property in order to meet their private purposes.

It finds that by regulating the area through the law and rules and regulations that there has been no physical invasion of the property by the state but merely

regulation of the area to prevent a public harm and long term private harm of removing usable recreational dry sand beach.

It finds that the highest and best use of dry sand beach is for public recreation.

It finds that the Appellants have shown no monetary losses as a result of this regulation.

It finds that the public has always had the customary usage of this beach. This use is characterized as follows:

1. The use has generally been exercised to a dune, vegetation line or to the face of a bulkhead. In this case, the public has regularly used the beach in question up to the bulkhead.

2. The recreational use of the Grand Strand area is uninterrupted. In this instance, the local municipality actually regulates certain uses of dry sand beach including vehicular traffic.

3. The use of the Grand Strand beaches and this beach in particular has been free and without dispute.

4. The public recreational use of the beach is reasonable use and one of the most common uses of the beach.

5. This beach is suitable to recreational use and this use is not repugnant to the law and in fact is supported by the Coastal Management Act.

It finds that mean high water mark fluctuates on the beachfront.

It finds that the enjoyment by the public of the beach area below mean high water is inseparable from the public use and enjoyment of the dry sand beach above the high water mark whether publicly or privately owned.

It finds that Section 48-39-20(E) recognizes that there is "decreasing open space for public use and shoreline erosion", and that the Council is charged with the responsibility of preserving the public's interest in the recreational uses of the dry sand beach.

CONCLUSIONS OF LAW

The Council bases its permit decisions upon the provisions of the Coastal Zone Management Act, the policies, rules and regulations promulgated thereunder, the individual merits of each case and other appropriate law.

The Appellant set forth grounds for appeal which can be narrowed to four basic questions set forth below.

I. Does the decision of the permit violate Rule 30-11?

II. Did the decision making process of the Agency fail to include factual determinations on the individual merits of this case, including no determination that it would be detrimental to the beach, so as to violate Section 48-39-150(A)?

III. Does the adverse impact on the Appellant exceed the projected benefits to the public, so as to warrant issuance of the permit?

IV. Does the denial of the permit amount to a "taking" without due process or just compensation in violation of Section 48-39-30(C), Article I, Section of the South Carolina Constitution, and the 5th Amendment of the U.S. Constitution?

The Council in voting to uphold the staff's decision to deny this permit rejects the Appellants position that the facts or law support approval of their project. The Council addresses each question as follows:

I. <u>As to R. 30-11</u>

Rule 30-11 as a whole sets forth General Guidelines for all critical areas

and clearly entails a balancing process between public and private interests in the context of long-range planning. Denial of this permit, however, meets these general guidelines and their purpose of the Council to "reduce the irreversible loss of ... beaches while meeting long-range state development needs." [See R. 30-11(A)]

R. 30-11(B) sets forth the ten general considerations as stated in 48-39-150 of the Act. Clearly B(3), B(4), B(5), B(7), B(8), B(9), and B(10) apply. Each of these considerations place a very high value on preservation of dry sand beaches over and against the right to reclaim such a resource.

R. 30-11(C) expresses the fact that any evaluation of a project which will impact on a critical area must take into account the findings and policies of the Act in

the context of long-range cumulative impacts of a projects. The cumulative effect of moving hard erosion control structures forward onto a dry-sand beach would be devastating to the public use and enjoyment of this resource. Although this project maybe insignificant in relationship to the entire coast, denial of the permit represents a commitment to good management of the state's dry sand recreational beaches.

Rule 30-11(C) cannot be read in a vacuum, but must be viewed in relation to other provisions of the Act and Rules and Regulations. The findings of the Act (48-39-120) recognize the loss of important coastal values due to ill-planned development and emphasizes "the urgent need to protect and give high priority to natural systems while balancing economic interests." The Council fleshed out these

findings in the program document and Rules and Regulation recognizing that preservation of the dry sand beach is of extreme significance. In addition, the Council has determined through these findings and its own case law that the greater public good of preserving this resource is detrimentally impacted by hard erosion control 22 structures in the critical area. (eg. Edge v. SCCC, Court of Common Pleas, Op. No. 86-CP-26-237).

Both the Management Program Document and Rules and Regulations find substantial value in the dry sand beach [see, eg. R.30-1(B)].

In addition, the Council recognizes the impact of hard erosion control structures on the beaches in R.30-13(A)(2)(a):

> These structures can protect features behind them, but they will not protect the beach on their seaward side. If such structures are constructed on an eroding beach,

> the erosion will in most cases continue, and the dry beach area will diminish and eventually disappear. In many cases, seawalls contribute to erosion of the beaches to their front as well as to the property on either emphasis added side.) (Also see IV 51-65, Management Program).

As a result of the obvious adverse impact erosion control structures have on beaches, the Council has followed an increasingly tighter policy of avoiding hard structures on the beach and has encouraged moving them as landward as possible when a structure is permitted. (See Edge v. SCCC) This is supported by the policies of the Act and pertinent rules and regulations. Section 48-39-30 specifically provides that the Council must:

> (B) (1) "Promote economic and social improvement of the citizens of this state and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a

coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone;

(B)(2) Protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations;"

In order to implement these policies, the Council has promulgated rules and regulations which clearly provide that the Appellants permit application should be denied. These regulations are as follows:

(1) The Council will promote the use of natural features of the dune and beach system rather than artificial protection. [R.30-13(A)(1)(b)]

(2) Erosion control structures must not interfere with existing or planned public access unless other adequate access cannot be provided. [R.30-13(A)(1)(d)]

(3) All erosion control projects must consist of environmentally accepted materials, demonstrate sound design and construction so that they could reasonably be expected to be safe and effective

and minimize adverse effects on the beach. [R.30-13(A)(1)(f)]

(4) Erosion control structures should not normally be approved except when erosion imminently threatens permanent improvements, including but not limited to buildings, paved parking lots, swimming pools, etc., which existed on the subject property ninety (90) days after the adoption of this regulation (September 27, 1981); or in the case of protecting property adjacent to existing erosion control structures; or, in the case of structures specifically called for in an approved erosion control plan. [R.30-13(A)(1)(g)]

(5) All applications for construction of a seawall/bulkhead/revetment in the beach or sand dune critical areas for purposes of filling behind these structures for the creation of land for private or public development will be denied by the Council. [R.30-13(A)(1)(b)(i)]

Applying the law and rules and regulations to the case at hand we find a permit application which seeks to advance a bulkhead onto the dry sand beach to these property lines for the purpose of erosion control. This is violation of the

law, policy and rules and regulations because:

(1) The permit purpose can be met without issuing a permit. There is an existing erosion control device on the site.

(2) There is no erosion at the site and there are no permanent structure imminently threaten.

(3) While there is an adjacent erosion control device that does not mean that you can automatically move seaward to bring them in line with one another.

(4) The project would have the effect of creating land for private use because filling behind the bulkhead would be required.

(5) Issuance of this permit would have a serious cumulative effect given the general policy against hard structures on beaches and reclamation of critical area for private purposes.

In addition to the findings set forth above concerning the project the following factors are pertinent to the decision to deny.

(1) This denial is consistent with treatment of other similarly situated persons.

(2) The dry sand beach generates a tourist industry which in turn creates 14 millions of dollars in revenue for the state each year. Our court recognized the significance of this tourist industry in Hucks v. Riley, et al., ____ S.C. ____, 357 S.E. 2d 458 (1987). Our court there said:

> The importance of the tourism industry to the economic viability of South Carolina cannot be underestimated. Tourism is the second largest industry in South Carolina. Tourists spent over 2.7 billion dollars in 1984, generating 262.5 million dollars in state, federal and local taxes, including 142 million dollars in state, tax collections. The Myrtle Beach area tourism expenditures amounted to more than 1.4 billion dollars in 1984.

(3) Sea Level is rising and the long range forecast for the coast of S.C. is not accretion but erosion of the shoreline.

(4) The general private interest is the same as the general public interest. Preservation of the dry sand beach means preservation of the coastal economy. The Appellant contends that his personal private interest will be affected, however, it is clear that he will continue to have the use to which his property has been dedicated, that is recreational dry sand beach.

(5) Beyond the Council's charge to meet "the urgent need to protect and give high priority to natural systems" (48-39-20)E), the Oil and Gas Act sets forth in 48-43-520(1) and (2) a declaration of use of the beach resource as follows:

(0) That "the General Assembly finds and declares that the highest and best use of the seacoast of the state is a source of pubic and private recreation. The General Assembly further finds and declares that the preservation of this use is a matter of the highest urgency in priority and that such use can only be served effectively by maintaining the coastal waters, estuaries, tidal flats, beaches and public lands adjoining the seacoast in as close to a pristine condition as possible, taking into account multiple use accommodations necessary to provide the broadest promotion of pubic and private interest.

By way of the foregoing, it is manifest that the decision to deny was not arbitrary and capricious and is consistent with all appropriate law.

II. As to section 48-39-150(A)

Appellant alleges that no "factual determination (was made) that the permit

would be detrimental to the beach ..." and this amounts to violation of Section 48-39-150(A) and the Appellants' right of due process [See D.(1) Appellant's Grounds]. In addition, Appellant alleges that the adverse impact of the decision clearly outweighs any benefit to the public [See D.(2)].

The Appellants proposition that no factual determination has been made as required by due process of law [Section 48-39-150(A)] is without merit. The Coastal Zone Management Act is based upon factual determinations set forth in its findings that support the decision made by the staff to deny this permit. Likewise, the Coastal Program Document and the Rules and Regulations set forth findings. These factual findings are all cited under Question I above.

These findings led to regulation intended to allow no structures on the beach except walkways and erosion control structures. Erosion control structures are allowed in a few circumstances. [See R.30-13 (A)(1)(G).] In addition to the findings of the Act and Rules and Regulations the Council's factual staff made the following determination:

> "There is an intact seawall in place on the site. Construction of an additional wall seaward of the present structure would not only have an adverse effect on the public beach, but would amount to the creation of land for private use. The installation of a vertical seawall could interrupt beach dynamics and possibly hasten erosion in other locations.
>
> The fact that a functional seawall is in place demonstrates that no habitable structure is imminently threatened by erosion. As such, this particular site does not qualify for any additional hard erosion control." (See denial letter of March 30, 1987, page 1.)

It is clear that a factual determination concerning the detrimental impact of erosion control structures on the beach resources has been made here and that the staff complied with 48-39-150(A). The due process argument is without merit in that all safeguards required by Article I, Section 22 of the Constitution, Section 48-39-180, and Section 1-23-310 of the Code have been met.

In addition to the foregoing it is significant to point out that a thorough hearing of all factors was made before the hearing officer. This hearing satisfied all due process concerns.

III. As to the adverse impact on permittee versus public good.

There is no adverse impact on the permittee. Reviewing the purposes stated at the hearing, the Council does not issue

permits intended to improve salability of a lot or to prevent buildup of sand on private property. For these purposes, issuance of a permit would amount to creation of highland solely for private purposes. Further, the record is clear that erosion control protection will not be improved by issuance of the permit.

On the other hand, the proposed project would deny public access to dry sand beach and could lead to substantial cumulative impacts if projects such as this were consistently permitted. As stated above, the Council has deemed that the public good in preserving the public dry sand beaches is significant.

IV. As to "taking" argument.

The Coastal Management Act was passed by the General Assembly as a recognition that "increasing and competing demands

upon the lands and waters of our coastal zone occasion by population growth and economic development.... have resulted in the decline or lost of living marine resources, wildlife, nutrient rich areas, permanent and adverse changes to ecological systems, decrease in open space for public use and shoreline erosion." (Section 48-39-20(B)) It further recognized that "important ecological, cultural natural geological and scenic characteristics... were being irretrievably damaged or lost by ill-planned development," and that there was an "urgent need to protect and give high priority to natural systems in the coastal zone while balancing economic interests." (See 48-39-20(E) and (F) respectively.)

The Coastal Management Act by placing a very high public interest in preserving the natural environment through a

management scheme, inherently created a public/private interest conflict over the limits of the police power of the state in regulating privately held tidelands and wetlands. In order to prevent unduly restrictive regulations, the Act provided that "no governmental agency shall adopt a rule or regulation or issue an order that is so unduly restrictive so as to constitute a taking of property without the payment of just compensation in violation of the constitution of this state or of the United States." (Section 48-39-30(C)). The South Carolina cases and cases relied upon by our Court in determining when police power constitutes a "taking" have thus far set a very high threshold for a successful challenge to the state's power in regulating the environment of the Coast.

The lead case is Carter v. South Carolina Coastal Council, 281 S.C. 202, 314 S.E. 2d 327 (1984).

Robert W. Carter applied for a permit from the South Carolina Coastal Council to raise the elevation of approximately 5.3 acres of marshland adjacent to Scott Creek in Edisto Island in Colleton County. The permit request for fill was denied by the Council. The South Carolina Supreme Court in overturning a determination by the Circuit Court that this was a "taking" held that "the Council's action constituted a legitimate exercise of the state's policy power, rather than an unreasonable "taking of respondents property." Without discussing what "unduly restrictive" means, our Court turned its attention to the duty every citizen has to use his property so as not to wrong or

injure others. It quotes from other decisions concerning this duty as follows:

> "Thus the ... [state] may properly regulate the use of property where uncontrolled use would be harmful to the public interest; and ...[this] regulation even though it prohibits the a beneficial use, will not necessarily be deemed a taking in the constitution sense. "See Brecciaroli v. Connecticut Commissioner of Environmental Protection, 362 A.2d 948, 951 (Connecticut. 1975); also see Goldblatt v. Hempstead, 369 U.S. 590, 825. CT. 987, 8 L.Ed. 130 (1962); Richards v. City of Columbia, 227 S.C. 538, 88 S.E. 2d 683 (1955).

Our Court then looked at the level of harm uncontrolled use of wetlands would have on the public welfare and determined that the Carter's permit request to fill wetlands was properly denied. The Court cited the findings of the Coastal Management Act which expressed the Legislature' s concern over declining natural resources in the coastal zone. (See Section 48-39-20(B)).

After looking at the value of the resource sought to be protected by the police power, the Court finally turned its attention to the value of the private landowner's interest in the wetland if it were filled. While the Court recognized the filled wetland would have a greater value to the Carter's, the court held:

> An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of other." Just v. Marinette County, 201 N.W. 2d 761, 768 (Wisc. 1972); Graham v. Estuary Properties,Inc., 399 S.E. 2d 1374, 1382 (Fla. 1981).

At issue in this case is whether Council's decision to limit the movement forward of existing seawalls on four lots at North Myrtle Beach, which would be 18 1/2 feet across two lots and twenty-four and 3/4 feet on the other two lots,

amounts to an unduly restrictive regulation.

Clearly, the facts of this case do not cross the threshold requiring compensation or amount to an unconstitutional taking. This is Carter on the beach. Here, as in Carter, the applicants would "change the essential natural character of [his] land so as to use it for a purpose for which it is unsuited in its natural state and which injures the rights of others."

Not only is this case similar to Carter, it has elements which militate more strongly that the regulation is a reasonable exercise of police power. Unlike Carter where the court protected rarely used marshlands, here we have dry sand beach which has customarily been used by the public time immemorial. Further, the resource here has significant economic consequences in that coastal tourism is

largely built in the continued existence of the dry sand beach. Thus, the resource "critical area" being protected more immediately and directly affects the public welfare than the resource (marshland) protected in Carter.

In addition to the conclusions reached in Carter, the United States Supreme Court recently in the case of Keystone Bituminous Coal Association v. DeBenedictis, U.S. [480 U.S. 221, 107 S.Ct. 1232, 94 L.Ed. 2d 472 14 (1987)], confirmed a consistent theme in taking cases presented to it by recognizing that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." Also see Mugler v. Kansas, 123 U.S., at 665; Beer Company v. Massachusetts, 97 U.S. 25, 32 (1878). When the use is deemed injurious to other

or amounts to a nuisance the courts generally hesitate to find a taking where the state merely restrains such private uses. See Takings, Private Property and Public Rights, 81 Yale L.J. 149, 155-161 (1971).

Here, the private use of dry sand beach is inconsistent with the common good because it negatively impacts a "critical" resource. This proposed project would eliminate public access to existing beach, potentially speed up erosion and ultimately impact the economy of the state. The proposed project as well has the potential of eventually impacting public trust lands by reducing the beach face and eliminating usable dry sand beach above and below mean high water. This would fall into the realm of nuisance.

In addition to the foregoing and in further support of the staff's decision,

the Council takes the position that the general public has a vested interest in the dry-sand beach up to the bulkhead line based upon the long usage of the dry-sand beach of the Grand Strand, the long acquiescence of the land owners to this use and the peculiar nature and value of the dry-sand beach. This position is supported by long recognized legal theories which when read solely and in combination, afford public rights in private lands and thus wholly defeat any argument of taking". There can be no taking because the permit denial is consistent with the vested public rights.

Courts across this country have recognized that dry-sand recreational beaches are impressed with the public's right to use and enjoy this resource. Recognizing the social and economic consequences of preservation of the dry-

sand beach, judges have employed many legal theories including prescriptive rights (see Seaway Company v. Attorney General, 375 S.W.2d 923, 937, (Tex. Civ. App. 1964)], implied dedication [see Gion v. City of Santa Cruz, 2 Cal. 3d 21, 465 P.2d 50 (1970), custom and usage (State ex rel. Thornton v. Hay, 254 Ore. 584. 462 P.2d 671 (1969), and the Public Trust Doctrine (Burrough of Neptune City v. Burrough of Avon by the Sea), 61 N.J. 296, 294, A.2d 47 (1972).

The legal theories differ in many aspects, but they all have one thing in common. Each theory is premised on the principle that the public, through its long and continued use of a dry sand beach, can acquire rights superior to the rights of the owner of the beach. The Council asserts that the public has for generations used the Grand Strand for

various forms of recreation and other uses and that this use has extended to some landward obstruction such as a dune, vegetation line or manmade device, these being the natural limits of public use. This is true of the site in question.

Several Courts have successfully applied the doctrine of custom and usage to fact situations similar to the one at hand. The Oregon Court in Thornton v. Hay determined that the public had acquired rights in the dry sand beach over and against private property rights through long usage. There the state sought to prevent the defendant landowners from enclosing dry sand beach within their oceanfront property lines.

Applying the tests of custom to the facts at hand, it is certain that permit was correctly denied.

1. The public has used the Grand Strand beaches for general recreation for generations. The use has generally been exercised to the dune or vegetation line. In this case, the public has regularly used the area of this lot up to the appellants' bulkhead.

2. The recreational use of the Grand Strand area is uninterrupted. In this instance the local municipality actually regulates certain uses on the dry sand beach.

3. The use has been free and without dispute.

4. Recreational use of the beach is reasonable and a common use of the beach. In fact, the beach is almost exclusively characterized by one use, recreational in nature.

5. The beach is suitable to the use.

6. The use has not been left to the landowners but dictated by custom.

7. This is not repugnant to the law and in fact is supported by various acts of the Legislature.

Support for the application of the doctrine of custom to the dry-sand beach of the Grand Strand can be found in the case law of South Carolina. Our court has

recognized that the public can acquire rights in private land through long use. [See Darlington v. Perkins, 239 S.E. 2d 69 (1977] We hold that under the doctrine of a custom and usage, the public has acquired a vested right to use the dry sand beach in the Grand Strand area and at this site particular.

Another equally compelling ground exists or denying this permit - the public trust doctrine. Our court has recognized that the public inherently has certain rights in private lands which are protected over and against the owner's unbridled use of his property. [Cape Romain Land and Improvement Company v. Georgia-Carolina Canning Company, 148 S.C. 428, 128 S.E. 434 (1928)]. The protection derived under Cape Romain comes in the form of the public trust doctrine which holds that tidelands are held in trust for

the people because they are so intrinsically important to society that private ownership of tidelands is qualified by use consistent with public interest. (See generally Sax, The Public Trust Doctrine and Natural Resource Law; Effective Judicial Intervention, 68 Michigan law review 473, 485 - 91(1970); and Wyche, Tidelands and the Public Trust: An Application for South Carolina, 7 Ecology L. Q. 137, 138-139 (1978).

While the public trust doctrine provides support for the use of the doctrine of custom to protect the valuable dry-sand beach resource for public recreational uses, the doctrine itself should be applied in support of the protection of the long held public use of the dry sand beach.

Our court has recognized that the public trust doctrine requires that lands

below mean nigh water in South Carolina are held in trust for public purposes. [(Cape Romain Land and Improvement Company v. Georgia Carolina Canning Company, 148 S.C. 428, 146 S.E. 434 (1928). (Also see Wyche, page 113.)] To date, our Court has not had the opportunity to discuss all the purposes (aside from navigation and fishing) which may be protected under the doctrine or if it can be applied above mean high water.

It is the Council's position that the public trust doctrine should be expanded to include public recreational uses to include the dry sand beach bordering the Atlantic Ocean above the mean high water mark. Given the unique geomorphic characteristics of the dry sand beach, its public character and economic significance to the state, expansion of the doctrine in this area is logical and appropriate.

First, significant public uses are at stake. The crisis which resulted in the development of the doctrine directly affected navigation and fishing which were the very basis of the economy of Elizabethan England. Today, however, swimming and other shore activities have become more important to the state than the traditional uses protected. It is clear that the economy of the state of South Carolina rests upon its tourism industry. (See Blue Ribbon Committee Report; State of South Carolina Coastal Management Final Environmental Impact Statement, 1-34.) Activities such as the one at hand threaten the use and enjoyment of the dry sand beach upon which the tourism industry is based. This position is supported by the state Attorney General who contended in 1970 that "the navigable waters, tidelands and submerged lands of

South Carolina are held in trust for and subject to public purposes and the rights of navigation, commerce, fishing, bathing, recreation or enjoyment in other public and useful purposes." (Op. South Carolina Attorney General, November 9, 1970.) In addition, the South Carolina Supreme Court of the state expanded the definition of navigable waters by determining the meaning of valuable floatage to include recreational use by the general public. (State vs. S.C. Coastal Council and C. E. Graham Reeves, et al., ____, S.C. ___, 346 S.E. 2d 716, S.C. 1986.)

In order for the public to fully enjoy the dry sand beach in this state, the public trust doctrine should be extended to include bathing swimming and other shore activities in recognition that they serve the general welfare and are as significant if not more significant than

fishing and navigation. Other states have embraced recreational use as a right guaranteed by the public trust doctrine. [Burrough of Neptune City v. Burrough of Avon-by-the-Sea], 61 N.J. 296, 303, 294 A.2d 47 (1972); Matthews v. Bayhead IMP Association, 95 N.J. 306, 471 A.2d 355 (N.J. 1984)]

> The enjoyment of this privilege [bathing in salt waters) of thus using the ocean and foreshore for ages without dispute should prove sufficient to establish it as an American common law right, similar to that of fishing in the sea, even if this right had not dome down to us as a part of English Common law, which it undoubtedly has. (White v. Hughes, 139 Fla. 5459, 190 So. 446, 449 (1939).

The Avon case is the leading case in this country recognizing that the public's rights in the dry sand and foreshore areas have been extended to protect "recreational uses including bathing, swimming and other shore activities." (61

N.J. at 309, 294 A.2d 47.) Adoption of the New Jersey rule by extension of the public trust doctrine to include the protection of recreational uses would do no injury to our case law, but instead would recognize the historical and continued actual use of the beaches of this state. Expansion of the doctrine to include these uses would not open the door to other areas because the beach is unique in character from a geographical, geomorphic and public use standpoint. Finally, if the public beaches are not held in trust, then no one has told public because they use it from its landward obstruction to the water (from either the vegetation line, dune line or first man-made structure).

Aside from the expansion of the public trust doctrine to include recreational use as a protected right of the public, the doctrine as well should be expanded beyond

the mean high water mark to include the dry-sand beach area up to the first impediment to use. As recognized in the Matthews case, this state should recognize that "enjoyment of rights in foreshore is inseparable from the use of dry sand beaches." inseparable from the use of dry sand beaches." (Matthews, at page 363; also see Lusardi v. Curtis Point Property Owners Association, 86 N.J. 217, 228, 430 A.2d 881 (1981). As pointed out by the New Jersey Court, "to say that the public trust doctrine entitles the public to swim in the ocean and use the foreshore in connection there with without assuring the public of a feasible access route would seriously impinge on, if not effectively eliminate the rights of the public trust doctrine." Matthews, 364. In addition, the public follows the movement of the tides below and above the mean high tide

mark in its pursuit of beach recreation. If the public has no right to use the beach above mean high tide, this would mean that the public's recreational use of the beach would be severely impacted, and in fact, eliminated at any tide which has a runup above mean high.

Most importantly, however, is the fact that mean high tide is a meaningless measure upon the ever dynamic beach/dune system along the ocean. In many instances, the mean high tide mark will vary as much as 100 feet during a given year because of the process of erosion and accretion of the beach. Thus, the public trust doctrine would apply in its normal sense subject to the daily location of the mean high tide mark. This makes meaningless any reliance upon the mean high tide mark for application of the doctrine.

The foreshore and dry sand recreational beach are clearly one dynamic entity, incapable of division by any legal theory. If, the state is to protect the historical use of the beach in a realistic manner, the public trust doctrine should be expanded to include all components of the beach and its use. As stated by the New Jersey Court in Matthews, "Recognizing the increasing demand for our state's beaches and the dynamic nature of the public trust doctrine, we find that the public must be given both access to and use of privately owned dry sand beaches as reasonably necessary and the public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on a dry sand beach" (page 365-366).

Application of this doctrine would mean then that the private landowner could not use his property in a manner which would

be inconsistent with public recreational use. In the case at hand, however, the property owner seeks to remove from the publicly used lands a portion of dry sand beach approximately 4,000 square feet in size. While this may be deemed insignificant on a single lot in the Grand Strand area, the same request of similarly situated property owners could significantly reduce the amount of dry sand beach resource available to the public. This would come at a time when the use is dramatically increasing and thus, could have a cumulative impact on the state resource in a significant magnitude.

It is thus clear that an imperative of uses demands a more realistic expansion of the public trust doctrine to include dry sand beaches as an integral part of the lands protected by government for the

public good. The Coastal Management Act represents an embodiment of the public trust doctrine as it relates to preservation of public rights in wetlands. The application of the doctrine to this matter would bolster the agency' s strong charge to protect public rights with which the Act is concerned. These specific concerns include the fact that:

> Important ecological, cultural, natural, geological and scenic characteristics, industrial, economic and historic values in the coastal zone are being irretrievably damaged or lost by ill-planned development that now threatens these values, [48-39-30(E)], and that there is a "decreasing open space for public use and shoreline erosion" [Section 48-39-20(B)].

The dry-sand beach in this case is deemed critical area because of its significance to the public weal and the impact that development has had upon this natural resource. The application of the public trust doctrine to the permit

application at hand would significantly aid the South Carolina Coastal Council in its efforts to continue to wisely manage a diminishing resource.

CONCLUSION

Based upon (1) the factual findings, applicable provisions of the Coastal Zone Management Act of 1977 and the policies, rules and regulations promulgated thereunder, and (2) applicable law, the Council concludes that the permit application was appropriately denied.

By a vote of 15 to 0 the staff's recommendation is upheld.

AND IT IS SO ORDERED.

THE SUPREME COURT OF SOUTH CAROLINA

CLYDE N. DAVIS, JR.
CLERK
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, SC 29211
PHONE NO. 734-1080

April 17, 1991

Fred B. Newby, Esquire
P. O. Box 719
Myrtle Beach, S. C. 29578

Re: Robert and Alice Beard v. S.C. Coastal Council, et al.

Dear Mr. Newby:

The Court has refused your Petition for Rehearing in the above case in the following order.

"Petition for Rehearing denied.

s/George T. Gregory, Jr. C.J.

s/A. Lee Chandler A.J.

s/Ernest A. Finney, Jr. A.J.

s/Jean H. Toal A.J.

"Petition for Rehearing granted.

s/David W. Harwell A.J.

April 17, 1991."

The remittitur in this matter is today being forwarded to the Clerk of Court for Horry County.

Sincerely yours,

CLERK

CND,Jr./dmh

cc: C. C. Harness, III, Esquire
James F. Chandler, Jr., Esquire
Dwight F. Drake, Esquire

APPENDIX E

CHAPTER 39

Coastal Tidelands and Wetlands

Sec.

48-39-10. Definitions.

48-39-20. Legislative declaration of findings.

48-39-30. Legislative declaration of state policy.

48-39-40. Creation of South Carolina Coastal Council; members; terms.

48-39-50. Powers and duties of Council.

48-39-60. Personnel provided by Wildlife and Marine Resources Department.

48-39-70. Cooperation of other agencies and commissions; administration of oaths; subpoenas.

48-39-80. Development of Coastal management program.

48-39-90. Public hearings on management plan.

48-39-100. Plan developed in cooperation with local governments.

48-39-110. Submission of plan by State Ports Authority.

48-39-120. Development of beach erosion control policy; issuance of permits for erosion control structures; removal of structures; limitation on development of property.

48-39-130. Permits required to utilize critical areas.

48-39-140. Submission of development plans; application for permits.

48-39-145. Application fee for permit to alter critical area; disposition of proceeds.

48-39-150. Approval or denial of permits; appeal to Council.
48-39-160. Violations; jurisdiction of courts.
48-39-170. Penalties.
48-39-180. Judicial review of permit determinations.
48-39-190. Lands not affected by chapter.
48-39-200. Restriction of Council's regulatory authority.
48-39-210. Council only state agency authorized to permit or deny alternations or utilizations within critical areas.
48-39-220. Legal action to determine interest in tidelands.

§ 48-39-10. Definitions.

As used in this chapter:

(A) "Applicant" means any person who filed an application for a permit under the provisions of this chapter.

(B) "Coastal zone" means all coastal waters and submerged lands seaward to the State's jurisdictional limits and all lands and waters in the counties of the State which

contain any one or more of the critical areas. These counties are Beaufort, Berkeley, Charleston, Colleton, Dorchester, Horry, Jasper and Georgetown.

(C) "Council" means the South Carolina Coastal Council.

(D) "CCPS" means Coastal Council Permitting Staff.

(E) "Saline waters" means those waters which contain a measurable quantity of sea water, at least one part chloride ion per thousand.

(F) "Coastal waters" means the navigable waters of the United States subject to the ebb and flood of the tide and which are saline waters, shoreward to their mean high-water mark. Provided, however, that the Council may

designate boundaries which approximate the mean extent of saline waters until such time as the mean extent of saline waters can be determined scientifically.

(G) "Tidelands" means all areas which are at or below mean high tide and coastal wetlands, mudflats, and similar areas that are contiguous or adjacent to coastal waters and are an integral part of the estuarine systems involved. Coastal wetlands include marshes, mudflats, and shallows and means those areas periodically inundated by saline waters whether or not the saline waters reach the area naturally or through artificial water courses and those areas that are normally characterized by the prevalence of saline water

vegetation capable of growth and reproduction. Provided, however, nothing in this definition shall apply to wetland areas that are not an integral part of an estuarine system. Further, until such time as the exact geographic extent of this definition can be scientifically determined, the Council shall have the authority to designate its approximate geographic extent.

(H) "Beaches" means those lands subject to periodic inundation by tidal and wave action so that no nonlittoral vegetation is established.

(I) "Primary ocean front sand dunes" means those duties which constitute the front row of dunes adjacent to the Atlantic Ocean.

(J) "Critical area" means any of the following: (1) coastal waters, (2) tidelands, (3) beaches and (4) primary ocean front sand dunes.

(K) "Person" means any individual, organization, association, partnership, business trust, estate trust, corporation, public or municipal corporation, county, local government unit, public or private authority and shall include the State of South Carolina, its political subdivisions and all its departments, boards, bureaus or other agencies, unless specifically exempted by this chapter.

(L) "Estuarine sanctuary" means a research area designated as an

estuarine sanctuary by the Secretary of Commerce.

(M) "Marine sanctuary" means any water and wetland areas designated as a marine sanctuary by the Secretary of Commerce.

(N) "Minor development activities" means the construction, maintenance, repair, or alteration of any private piers or erosion control structure, the construction of which does not involve dredge activities.

(O) "Dredging" means the removal or displacement by any means of soil, sand, gravel, shells or other material, whether of intrinsic value or not, from any critical area.

(P) "Filling" means either the displacement of saline waters by

the depositing into critical areas of soil, sand, gravel, shells or other material or the artificial alteration of water levels or water currents by physical structure, drainage ditches or otherwise.

(Q) "Submerged lands" means those river, creek and ocean bottoms lying below mean low-water mark.

(R) "Oil" means crude petroleum oil and all other hydrocarbons, regardless of specific gravity, that are produced in liquid form by ordinary production methods, but does not include liquid hydrocarbons that were originally in a gaseous phase in the reservoir.

(S) "Gas" means all natural gas and all other fluid hydrocarbons not

hereinabove defined as oil, including condensate because it originally was in a gaseous phase in the reservoir.

(T) "Fuel" means gas and oil.

(U) "Emergency" means any unusual incident resulting from natural or unnatural causes which endanger the health, safety or resources of the residents of the State, including damages or erosion to any beach or shore resulting from a hurricane, storm or other such violent disturbance.

§ 48-39-20. Legislative declaration of findings.

The General Assembly finds that:

(A) The coastal zone is rich in a variety of natural, commercial, recreational and industrial

resources of immediate and potential value to the present and future well-being of the State.

(B) The increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development, including requirements for industry, commerce, residential development, recreation, extraction of mineral resources and fossil fuels, transportation and navigation, waste disposal and harvesting of fish, shellfish and other living marine resources have resulted in the decline or loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological

systems, decreasing open space for public use and shoreline erosion.

(C) A variety of federal agencies presently operate land use controls and permit systems in the coastal zone. South Carolina can only remain control of the regulation of its critical areas by developing its own management program. The key to accomplishing this is to encourage the state and local governments to exercise their full authority over the lands and waters in the coastal zone.

(D) The coastal zone and the fish, shellfish, other living marine resources and wildlife therein, may be ecologically fragile and consequently extremely vulnerable

to destruction by man's alterations.

(E) Important ecological, cultural, natural, geological and scenic characteristics, industrial, economic and historical values in the coastal zone are being irretrievably damaged or lost by ill-planned development that threatens to destroy these values.

(F) In light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone while balancing economic interests, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate.

§ 48-39-30. Legislative declaration of state policy.

(A) The General Assembly declares the basic state policy in the implementation of this chapter is to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the State.

(B) Specific state policies to be followed in the implementation of this chapter are:

(1) To promote economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal

planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone;

(2) To protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations;

(3) To formulate a comprehensive tidelands protection program;

(4) To formulate a comprehensive beach erosion and protection policy including the

protection of necessary sand dunes.

(5) To encourage and assist state agencies, counties, municipalities and regional agencies to exercise their responsibilities and owners in the coastal zone through the development and implementation of comprehensive programs to achieve wise use of coastal resources giving full consideration to ecological, cultural and historic values as well as to the needs for economic and social development and resources conservation.

(C) In the implementation of the chapter, no government agency shall adopt

a rule or regulation or issue any order that is unduly restrictive so as to constitute a taking of property without the payment of just compensation in violation of the Constitution of this State or of the United States.

(D) Critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses which will generate measurable maximum dollar benefits. As such, the use of a critical area for one or a combination of like uses to the exclusion of some or all other uses shall be consistent with the purposes of this chapter.

(E) It shall be the policy of the State to coordinate the coastal planning and management program effort with other coastal states and organizations of coastal states.

§ 48-39-40. Creation of South Carolina Coastal Council; members; terms.

(A) There is hereby created the South Carolina Coastal Council which shall consist of eighteen members as follows: Eight members, one from each coastal zone county, to be appointed by the local county governing body; six members, one from each of the congressional districts of the State, to be elected by a majority vote of the members of the House of Representatives and the Senate representing the counties in such district, each such House or Senate member to have one vote; and the following legislative members who shall serve ex officio: Two state Senators, one to be appointed by the President of the State and one to be elected by the Senate Fish, Game and Forestry Committee; and two

members of the House of Representatives to be appointed by the Speaker of the House. The Council shall elect a chairman, vice-chairman and such other officers as it deems necessary.

(B) Terms of legislative members shall be coterminous with their terms as members of the General Assembly. Terms of all non-legislative members shall be for four years and until successors are appointed and qualify, except that of those initially appointed three of the members appointed by county governing bodies and two members from congressional districts shall serve terms of two years only as determined by lot at the first meeting of the Council. Vacancies shall be filled in the original manner of selection for the unexpired term.

§ 48-39-50. Powers and Duties of Council.

The Council shall have the following powers and duties:

(A) To employ the CCPS consisting of, but not limited to, the following professional members: An administrator and other staff members to include those having expertise in biology, civil and hydrological engineering, planning, environmental engineering and environmental law.

(B) To apply for, accept and expend financial assistance from public and private sources in support of activities undertaken pursuant to this chapter and the Federal Coastal Zone Management Act of 1972.

(C) To undertake the related programs necessary to develop and recommend to the Governor and the General

Assembly a comprehensive program designed to promote the policies set forth in this chapter.

(D) To hold public hearings and related community forums and afford participation in the development of management programs to all interested citizens, local governments and relevant state and federal agencies, port authorities and other interested parties.

(E) To promulgate necessary rules and regulations to carry out the provisions of this chapter.

(F) To administer the provisions of this chapter and all rules, regulations and orders promulgated under it.

(G) To examine, modify, approve or deny applications for permits for

activities covered by the provisions of this chapter.

(H) To revoke and suspend permits of persons who fail or refuse to carry out or comply with the terms and conditions of the permit.

(I) To enforce the provisions of this chapter and all rules and regulations promulgated by the Council and institute or cause to be instituted in courts of competent jurisdiction of legal proceedings to compel compliance with the provisions of this chapter.

(J) To management estuarine and marine sanctuaries and regulate all activities therein, including the regulation of the use of the coastal waters located within the boundary of such sanctuary.

(K) To establish, control and administer pipeline corridors and locations of pipelines used for the transportation of any fuel on or in the critical areas.

(L) To direct and coordinate the beach and coastal shore erosion control activities among the various state and local governments.

(M) To implement the state policies declared by this chapter.

(N) To encourage and promote the cooperation and assistance of state agencies, coastal regional councils of government, local governments, federal agencies and other interested parties.

(O) To exercise all incidental powers necessary to carry out the provisions of this chapter.

(P) To coordinate the efforts of all public and private agencies and organizations engaged in the making of tidal surveys of the coastal zone of this State with the object of avoiding unnecessary duplication and overlapping.

(Q) To serve as a coordinating state agency for any program of tidal surveying conducted by the federal government.

(R) To develop uniform specifications and regulations for tidal surveying.

(S) To monitor, in coordination with the South Carolina Department of Wildlife and Marine Resources, the waters of the State for oil spills. If such Department observes an oil spill in such waters it shall immediately report

such spill to the South Carolina Department of Health and Environmental Control, the United States Coast Guard and Environmental Protection Agency. This in no way negates the responsibility of the spiller to report a spill.

(T) To direct, in coordination with the South Carolina Department of Health and Environmental Control as the designated state agency to provide liaison to the regional response team, pursuant to Section 1510.23 of the National Contingency Plan, state supervised removal operations of oil discharged into the waters within the territorial jurisdiction of this State and entering such waters after being discharged

elsewhere within the State, and to seek reimbursement from the National Contingency Fund for removal operations cost expended by it and all other agencies and political subdivisions including county, municipal and regional governmental entities in removing such oil as provided for in Section 311(C)(2) of the Federal Water Pollution Control Act.

(U) To act as advocate, where the Council deems such action is appropriate, on behalf of any person who is granted a permit for a specific development by the Council but is denied a permit by a federal agency for the same specific development.

(V) To delegate any of its powers and duties to the CCPS.

§ 48-39-60. Personnel provided by Wildlife and Marine Resources Department.

When requested by the Council, the Wildlife and Marine Resources Department shall provide additional staff for the Council, including any additional conservation officers, necessary to administer the provisions of this chapter and for which funds are available.

§ 48-39-70. Cooperation of other agencies and commissions; administration of oaths; subpoenas.

(A) All other state and local agencies and commissions shall cooperate with the Council in the administration of enforcement of this chapter. All agencies currently exercising regulatory authority in the coastal zone shall administer such authority in accordance with the

provisions of this chapter and rules and regulations promulgated thereunder.

(B) The Council in the discharge of its duties may administer oaths and affirmations, take depositions and issue subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda and other records deemed necessary in connection with the work of the Council. The only exception shall be, that information considered proprietary by the applicant. If in the opinion of the Council a proper decision cannot be rendered without the submission of such proprietary information, the Council shall be empowered to execute an agreement on confidentiality with the applicant and such information shall not be made a part of the public record of current or future proceedings.

(C) In case the contumacy by any person or refusal to obey a subpoena issued to any person, any circuit court of this State or circuit judge thereof within the jurisdiction of which such person guilty of contumacy or refusal to obey is found, resides or transacts business, upon application by the Council, may issue to such person an order requiring him to appear before the Council to produce evidence if so ordered or give testimony touching the matter under investigation. Any failure to obey an order of the court may be punished as a contempt hereof. Subpoenas shall be issued in the name of the Council and signed by the Council chairman. Subpoenas shall be issued to such persons as the Council may designate.

§ 48-39-80. Development of coastal management program.

The council shall develop a comprehensive coastal management program, and thereafter have the responsibility for enforcing and administering the program in accordance with the provisions of this chapter and any rules and regulations promulgated under this chapter. In developing the program the Council shall:

(A) Provide a regulatory system which the Council shall use in providing for the orderly and beneficial use of the critical areas.

(B) In devising the management program the Council shall consider all lands and waters in the coastal zone for planning purposes. In addition, the Council shall:

(1) Identify present land uses and coastal resources.

(2) Evaluate these resources in terms of their quality,

quantity and capability for use both now and in the future.

(3) Determine the present and potential uses and the present and potential conflicts in uses of each coastal resource.

(4) Inventory and designate areas of critical state concern within the coastal zone, such as port areas, significant natural and environmental, industrial and recreational areas.

(5) Establish broad guidelines on priority of uses in critical areas.

(6) Provide for adequate consideration of the local, regional, state and national

interest involved in the siting of facilities for the development, generation, transmission and distribution of energy, adequate transportation facilities and other public services necessary to meet requirements which are other than local in nature.

(7) Provide for consideration of whether a proposed activity of an applicant for a federal license or permit complies with the State's coastal zone program and for the issuance of notice to any concerned federal agency as to whether the State concurs with or objects to the proposed activity.

(8) Provide for a review process of the management plan and alterations thereof that involves local, regional, state and federal agencies.

(9) Conduct other studies and surveys as may be required, including the beach erosion control policy as outlined in this chapter.

(10) Devise a method by which the permitting process shall be streamlined and simplified so as to avoid duplication.

(11) Develop a system whereby the Council shall have the authority to review all state and federal permit applications in the coastal zone, and to certify that

these do not contravene the management plan.

(C) Provide for a review process of the management program and alterations that involve interested citizens as well as local, regional, state and federal agencies.

(D) Consider in conjunction with the Department of Health and Environmental Control the planning and review of existing water quality standards and classifications in the coastal zone.

(E) Provide consideration for nature-related uses of critical areas, such as aquaculture, mariculture, waterfowl and wading bird management, game and nongame

habitat protection projects and endangered flora and fauna.

§ 48-39-90. Public hearings on management plan.

(A) The Council, on thirty days' notice, shall hold statewide public hearings on the proposed coastal zone management plan to obtain the views of all interested parties, particularly all interested citizens, agencies, local governments, regional organizations and port authorities.

(B) All Council documents associated with such hearings shall be conveniently available to the public for review and study at least thirty days prior to a hearing. A report of each hearing shall be prepared and made available to the public within forty-five days of such hearing.

(C) After sufficient hearings and upon consideration of the views of interested parties the Council shall propose a final management plan for the coastal zone to the Governor and the General Assembly.

(D) Upon review and approval of the proposed management plan by the Governor and General Assembly, the proposed plan shall become the final management plan for the State's coastal zone.

(E) Any change in or amendment to the final management plan shall be implemented by following the procedures established in subsections (A), (B), (C) and (D) of this section and upon the review and approval of the Governor and the General Assembly.

§ 48-39-100. Plan developed in cooperation with local governments.

(A) The management program specified in § 48-39-90 shall be developed in

complete cooperation with affected local governments in the coastal zone. This cooperation shall include, but not be limited to:

(1) Involvement of local governments or their designees in the management program.

(2) Provision of technical assistance and grants to aid local governments in carrying out their responsibilities under this chapter.

(3) Dissemination of improved informational data on coastal resources to local and regional governmental units.

(4) Recommendations to local and regional governmental units as to needed modifications or alterations in local

ordinances that become apparent as a result of the generation of improved and more comprehensive information.

(B) Any city or county that is currently enforcing a zoning ordinance, subdivision regulation or building code, a part of which applies to critical areas, shall submit the elements of such ordinances and regulations applying to critical areas to the Council for review. The Council shall evaluate such ordinances and plans to determine that they meet the provisions of this chapter and rules and regulations promulgated hereunder. Upon determination and approval by the Council, such ordinances and regulations shall be adopted by the Council, followed by the Council in meeting its permit responsibilities under this chapter and

integrated into the Council's Coastal Management Program. Any change or modification in the elements of approved zoning ordinances, subdivision regulations or building codes applying to critical areas shall be disapproved by the Council if it is not in compliance with the provisions of this chapter and rules and regulations promulgated hereunder.

(C) Any city or county that is not currently enforcing ordinances or regulations on the critical areas within its jurisdiction at its option may elect to develop a management program for such critical areas by notifying the Council of its intent within one hundred and eighty days following the 24th day of May, 1977. Such proposed ordinances and regulations applying to critical areas shall be subject to the process specified in § 48-39-100(B).

(D) Any county or city may delegate some or all of its responsibilities in developing a costal management program for critical areas under its jurisdiction to the regional council of government of which it is a part, provided the county or city has notified the Council in writing at least thirty days prior to the date on which such action is to be taken.

§ 48-39-110. Submission of plan by State Ports Authority.

The South Carolina State Ports Authority shall prepare and submit to the Council a management plan for port and harbor facilities and navigation channels. Upon approval by the Council of such management plan it shall become part of the comprehensive coastal management program developed by the Council. The South Carolina State Ports Authority shall

include in the management plan a designation of the geographical area appropriate for use by public and private port and harbor facilities and military and naval facilities and submit this to the Council for approval.

ATTORNEY GENERAL'S OPINIONS

The South Carolina Ports Authority and the South Carolina Public Service Authority do not come within the definition of State agency as that term is used by the General Assembly in § 24 of the General Appropriations Act 1978-1979. 1978 Op Att'y Gen, No 78-210, p 243.

§ 48-39-120. Development of beach erosion control policy; issuance of permits for erosion control structures; removal of structures; limitation on development of property.

(A) The Council shall develop and institute a comprehensive beach erosion control policy that identifies critical erosion areas, evaluates the benefits and costs of erosion control structures funded by the State, considers the dynamic littoral and offshore drift systems, and dunes and like items.

(B) The Council for and on behalf of the State may issue permits for erosion control structures following the provisions of this section and §§ 48-39-140 and 48-39-150, on or upon the tidelands and coastal waters of this State as it may deem most advantageous. Provided, however, that no property rebuilt or accreted as a result of natural forces or as a result of a permitted structure shall exceed the original property line or boundary. Provided, further, that no person or governmental

agency may develop ocean front property accreted by natural forces or as the result of permitted or nonpermitted structures beyond the mean high water mark as it existed at the time the ocean front property was initially developed or subdivided, and such property shall remain the property of the State held in trust for the people of the State.

(C) The Council shall have the authority to remove all erosion control structures which have an adverse effect on the public interest.

(D) The Council is authorized for and in behalf of the State to accept such federal monies for beach or shore erosion control in areas to which the public has full and complete access as are available and to sign all necessary agreements and to do and perform all necessary acts in

connection therewith to effectuate the intent and purposes of such federal aid.

(E) If a beach or share erosion emergency is declared by the Council, the State, acting through the Council, may spend whatever state funds are available to alleviate beach or share erosion in areas to which the public has full and complete access, including any funds which may be specifically set aside for such purposes.

(F) The Council, for and on behalf of the State, may issue permits not otherwise provided by state law, for erosion and water drainage structure in or upon the tidelands, submerged lands and waters of this State below the mean high-water mark as it may deem most advantageous to the State for the purpose of promoting the public health, safety and welfare, the protection of public and private property

from beach and shore destruction and the continued use of tidelands, submerged lands and waters for public purposes.

§ 48-39-130. Permits required to utilize critical areas.

(A) Ninety days after July 1, 1977, no person shall utilize a critical area for a use other than the use the critical area was devoted to on such date unless he has first obtained a permit from the Council.

(B) Within sixty days of July 1, 1977, the Council shall publish and make available the interim rules and regulations it will follow in evaluating permit applications. These interim rules and regulations shall be used in evaluating and granting or denying all permit applications until such time as the final rules and regulations are adopted in accordance with this section and Chapter

23 of Title 1. Within one hundred and twenty days of July 1, 1977 the Council shall publish and make available to local and regional governments and interested citizens for review and comment a draft of the final rules and regulations it will follow in evaluating permit applications. Sixty days after making such guidelines available the Council shall hold a public hearing affording all interested persons an opportunity to comment on such guidelines. Following the public hearing the Council shall in ninety days publish final rules and regulations. Provided, however, the interim rules and regulations shall not be subject to the provisions of Chapter 23 of Title 1.

(C) Ninety days after July 1, 1977 no person shall fill, remove, dredge, drain or erect any structure on or in any way alter any critical area without first

obtaining a permit from the Council. Provided, however, that a person who has legally commenced a use such as those evidenced by a state permit, as issued by the Budget and Control Board, or a project loan approved by the rural electrification administration or a local building permit or has received a United States Corps of Engineers or Coast Guard permit, where applicable, may continue such use without obtaining a permit. Any person may request the Council to review any project or activity to determine if he is exempt under this section from the provisions of this chapter. The Council shall make such determinations within forty-five days from the receipt of any such request.

(D) It shall not be necessary to apply for a permit for the following activities:

(1) The accomplishment of emergency orders of any duly

appointed official of a county, municipality or of the State, acting to protect the public health and safety, upon notification to the Council.

(2) Hunting, erecting duckblinds, fishing, shellfishing and trapping when and where otherwise permitted by law; the conservation, repletion and research activities of state agencies and educational institutions or boating or other recreation provided that such activities cause no material harm to the flora, fauna, physical or aesthetic resources of the area.

(3) The discharge of treated effluent as permitted by law; provided, however, that the Council shall have the authority to review and comment on all proposed permits that would affect critical areas.

(4) Dredge and fill performed by the United States Corps of Engineers for the maintenance of the harbor channels and the collection and disposal of the materials so dredged; provided, however, that the Council shall have authority to review and certify all such proposed dredge and fill activities.

(5) Construction of walkways over sand dunes in accordance with

regulations promulgated by the Council.

(6) Emergency repairs to any existing bank, dike or structure which has been erected in accordance with federal and state laws, including fishing piers which are provided for by general law or acts passed by the General Assembly of South Carolina; provided, however, that notice shall be given to the Council within seventy-two hours from the onset of needed repairs.

(7) Maintenance and repair of drainage and sewer facilities constructed in accordance with federal or state laws and normal maintenance and

repair of any utility or railroad.

(8) Normal maintenance or repair to any pier or walkway provided that such maintenance or repair not involve dredge or fill.

(9) Construction or maintenance of a major utility facility where the utility has obtained a certificate for such facility under "The Utility Facility Siting and Environmental Protection Act", Chapter 33 of Title 58 of the 1976 Code. Provided, however, that the South Carolina Public Service Commission shall make the Council a party to certification proceedings for

utility facilities within the coastal zone.

§ 48-39-140. Submission of development plans; application for permits.

(A) Any person who wishes may submit development plans to the Council for preliminary review. If a permit is necessary, the Council will make every effort to assist the applicant in expediting the permit application.

(B) Each application for a permit shall be filed with the Council and shall include:

(1) Name and address of the applicant.

(2) A plan or drawing showing the applicant's proposal and the manner or method by which the proposal shall be accomplished.

(3) A plat of the area in which the proposed work will take place.

(4) A copy of the deed, lease or other instrument under which the applicant claims title, possession or permission from the owner of the property, to carry out the proposal.

(5) A list of all adjoining landowners and their addresses or a sworn affidavit that with due diligence such information is not ascertainable.

(C) The Council within thirty days of receipt of an application for a permit shall notify, in writing, interested agencies, all adjoining landowners, local government units in which the land is located and other interested persons of

the application and shall indicate the nature of the applicant's proposal. Public notice shall be given at least once by advertisement in state and local newspapers of general circulation in the area concerned. The Council may hold a public hearing on applications which have any effect on a critical area if it deems a hearing necessary. The public hearing shall be held in the county where the land is located and if in more than one county the Council shall determine in which county to holding the hearing or may hold hearings in both counties.

Provided, all interested agencies, all adjoining landowners, local government units and other interested persons shall have thirty days to file written comment to such application after receipt of any such notice by the Council.

§ 48-39-145. Application fee for permit to alter critical area; disposition of proceeds.

(A) The South Carolina Coastal Council may charge an administrative fee upon application for a permit for alteration of any critical area as defined in § 48-39-10. Applications for permits which are noncommercial/nonindustrial in nature and provide personal benefits that have no connection with a commercial/industrial enterprise shall be charged an administrative fee not to exceed fifty dollars. A reasonable fee, determined by the South Carolina Coastal Council, will be charged for permit applications when the planned or ultimate purpose of the activity is commercial or industrial in nature.

(B) Any fees collected under this

provision shall be forwarded to the State Treasurer for credit to the general fund.

§ 48-39-150. Approval or denial of permits; appeal to Council.

(A) In determining whether a permit application is approved or denied the Council shall base its determination on the individual merits of each application, the policies specified in §§ 48-39-20 and 48-39-30 and be guided by the following general considerations:

(1) The extent to which the activity requires a waterfront location or is economically enhanced by its proximity to the water.

(2) The extent to which the activity would harmfully obstruct the natural flow of navigable water. If the

proposed project is one or more of the State's harbors or in a waterway used for commercial navigation and shipping or in an area set aside for port development in an approved management plan, then a certificate from the South Carolina State Ports Authority declaring the proposed project or activity would not unreasonably interfere with commercial navigation and shipping must be obtained by the Council prior to issuing a permit.

(3) The extent to which the applicant's completed project would affect the production of fish, shrimp, oysters, crabs or clams or any marine

life or wildlife or other natural resources in a particular area including but not limited to water and oxygen supply.

(4) The extent to which the activity could cause erosion, shoaling of channels or creation of stagnant water.

(5) The extent to which the development could affect existing public access to tidal and submerged lands, navigable waters and beaches or other recreational coastal sources.

(6) The extent to which the development could affect the habitats for rare and endangered species of wildlife or irreplaceable

historic and archaeological sites of South Carolina's coastal zone.

(7) The extent of the economic benefit as compared with the benefits from preservation of an area in its unaltered state.

(8) The extent of any adverse environmental impact which cannot be avoided by reasonable safeguards.

(9) The extent to which all feasible safeguards are taken to avoid adverse environmental impact resulting from a project.

(10) The extent to which the proposed use could affect the value and enjoyment of adjacent owners.

(B) After considering the views of interested agencies, local governments and persons, and after evaluation of biological and economic considerations, if the Council finds that the application is not contrary to the policies specified in this chapter, it shall issue to the applicant a permit. The permit may be conditioned upon the applicant's amending the proposal to take whatever measures the Council feels are necessary to protect the public interest. At the request of twenty citizens or residents of the county or counties affected, the Council shall hold a public hearing on any application which has an effect on a critical area, prior to issuing a permit. Such public hearings shall be open to all citizens of the State. When applicable, joint public hearings will be held in conjunction with any such hearings required by the U.S.

Army Corps of Engineers. On any permit application pertaining to a specific development which has been approved by the Council, the Council may support the applicant with respect to any federal permit applications pertaining to the same specific development.

(C) The Council shall act upon an application for a permit within ninety days after the application is filed. Provided, however, that in the case of minor developments, as defined in § 48-39-10, the Council shall have the authority to approve such permits and shall act within thirty days. In the event a permit is denied the Council shall state the reasons for such denial and such reasons must be in accordance with the provisions of this chapter.

(D) Any applicant having a permit denied or any person adversely affected by

the granting of the permit has the right of direct appeal to the Council. Any applicant having a permit denied may challenge the validity of any or all reasons given for denial.

(E) Any permit may be revoked for noncompliance with or violation of its terms after written notice of intention to do so has bee given the holder and the holder given an opportunity to present an explanation to the Council.

(F) Work authorized by permits issued hereunder shall be completed within three years after the date of issuance of the permit. The time limit may be extended for good cause showing that due diligence toward completion of the work has been made as evidenced by significant work progress.

§ 48-39-160. Violations; jurisdictions of courts.

The circuit court of the county in which the affected critical area or any part thereof lies shall have jurisdiction to restrain a violation of this chapter at the suit of the Council, the Attorney General or any person adversely affected. In the event the affected critical area lies in more than one county, jurisdiction shall be in the circuit court of any county in which any part of the area lies. In the same action the circuit court having jurisdiction over the affected area may require such area to be restored to its original condition, if possible, and environmentally desirable. In the alternative, the Council may complete the restoration at the expense of the person altering the area in which case suit for recovery of the amount so expended may be

brought in any court having jurisdiction to restrain a violation. No bond shall be required as a condition of the granting of a temporary restraining order under this section, except that the court may in its discretion require that a reasonable bond be posted by any person requesting the court to restrain a violation of this chapter.

§ 48-39-170. Penalties.

(A) Any person violating any provision of this chapter shall be deemed guilty of a misdemeanor and upon conviction shall be punished by imprisonment of not more than six months or by a fine of not more than five thousand dollars, or both, for the first offense, and by imprisonment of not more than one year, or by a fine of not more than ten thousand dollars, or both, for each subsequent offense.

(B) Any violation of any provision of this chapter involving five yards square (225 square feet) or less of critical area may be treated as a minor violation, the penalty for which shall be a fine of not less than fifty dollars nor more than two hundred dollars. The conservation officers of the South Carolina Wildlife and Marine Resources Department may serve warrants under this provision and otherwise enforce this chapter. The magistrates of this State have jurisdiction over minor violations of this chapter. Each day of noncompliance with any order issued relative to a minor violation or noncompliance with any permit regulation, standard, or requirement relative to a minor violation shall constitute a separate offense; provided, however, that violations which involve the construction or repair of water control

structures shall not be considered minor violations regardless of the area involved.

(C) Any person who is determined to be in violation of any provision of this chapter by the Coastal Council shall be liable for, and may be assessed by the Council for, a civil penalty of not less than one hundred dollars nor more than one thousand dollars per day of violation. Whenever the Council determines that any person is in violation of any permit, regulation, standard, or requirement under this chapter, the Council may issue an order requiring such person to comply with such permit, regulation, standard, or requirement, including an order requiring restoration when deemed environmentally appropriate by the Council; in addition, the Council may bring a civil enforcement action under this section as well as

seeking an appropriate injunctive relief under § 48-39-160.

(D) All penalties assessed and collected pursuant to this section shall be deposited in the general fund of the State.

§ 48-39-180. Judicial review of permit determinations.

Any applicant whose permit application has been denied, revoked, suspended or approved subject to conditions of the Council, or any person adversely affected by the permit, may, within twenty days after receiving notice thereof, file petition in the circuit court having jurisdiction over the affected land for a review of the Council's action "de novo" or to determine whether the Council's action so restricts or otherwise affects the use of the property as to deprive the

owner of its existing practical use and is an unreasonable exercise of the State's police power because the action constitutes the equivalent of taking without compensation. If the court finds the action to be an unreasonable exercise of the police power it shall enter a finding that the action shall not apply to the land of the plaintiff, or in the alternative, that the Council shall pay reasonable compensation for the loss of use of the land. The use allowed by any permit issued under this chapter may, in the discretion of the court, be stayed pending decision on all appeals that may be taken. The circuit court may in its discretion require that a reasonable bond be posted by any person. It is specifically intended that any person whose permit application has been denied may have such permit issued by the circuit

court having jurisdiction if such person can prove the reasons given for denial to be invalid.

§ 48-39-190. Lands not affected by chapter.

Nothing in this chapter shall affect the status of the title of the State or any person to any land below the mean highwater mark. The State shall in no way be liable for any damages as a result of the erection of permitted work.

§ 48-39-200. Restriction of Council's regulatory authority.

Notwithstanding any other provisions of this chapter, the Council shall have no direct regulatory authority over any area outside the critical areas in the coastal zone.

§ 48-39-219. Council only state agency authorized to permit or deny alterations or utilizations within critical areas.

Ninety days after July 1, 1977, the Council shall be the only state agency with authority to permit or deny any alteration or utilization within the critical area except for the exemptions granted under § 48-39-130(D) and such application for a permit shall be acted upon within the time prescribed by this chapter.

§ 48-39-220. Legal action to determine interest in tidelands.

(A) Any person claiming an interest in tidelands which, for the purpose of this section, means all lands except beaches in the Coastal Zone between the mean high-water mark and the mean low-water mark of navigable waters without regard to the

degree of salinity of such waters, may institute an action against the State of South Carolina for the purpose of determining the existence of any right, title or interest of such person in and to such tidelands as against the State. Service of process shall be made upon the secretary of the State Budget and Control Board.

(B) Any party may demand a trial by jury in any such action by serving upon the other party(s) a demand therefor in writing at any time after the commencement of the action and not later than ten (10) days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

(C) Nothing contained in this chapter shall be construed to change the law of this State as it exists on July 1, 1977,

relative to the right, title, or interest in and to such tidelands, except as set forth in this section.

(D) The Attorney General shall immediately notify the Council upon receipt of any private suit made under this section, his response to that suit, and the final disposition of the suit. The Council will publish all such notifications in the state register.

Supreme Court, U.S.
L E D
AUG 5 1991
OFFICE OF THE CLERK

No. 91-137

In The

Supreme Court of the United States

October Term, 1991

ROBERT AND ALICE BEARD,

Petitioners,

vs.

SOUTH CAROLINA COASTAL COUNCIL, SIERRA CLUB, CHARLESTON NATURAL HISTORY SOCIETY AND SOUTH CAROLINA WILDLIFE FEDERATION,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of The United States

BRIEF OF RESPONDENT SOUTH CAROLINA COASTAL COUNCIL IN OPPOSITION

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QUESTION PRESENTED

In *Robert and Alice Beard v. South Carolina Coastal Council, Sierra Club, Charleston Natural History Society and South Carolina Wildlife Federation,* ___ S.C. ___, 403 S.E.2d 620 (1991), the South Carolina Supreme Court held denial of a permit application to build a bulkhead on front beach property adjacent to the Atlantic Ocean in Horry County, South Carolina did not constitute an unconstitutional taking of property in violation of the Fifth Amendment of the United States Constitution. The question presented is:

Does the regulation of a portion of private property pursuant to a valid exercise of police power result in an unconstitutional taking of private property pursuant to the Fifth Amendment of the United States Constitution?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

I. The Petitioners failed to demonstrate that any special or important reason for the grant of certiorari exists, as required by Rule 10 3

II. The Petitioners failed to follow Supreme Court Rule 14(h) in that they did not show that the federal questions relating to the Fifth Amendment as set forth in the Petition were timely and properly raised so as to give this Court jurisdiction for a Writ of Certiorari 4

III. The Supreme Court of South Carolina properly concluded that the South Carolina Coastal Council action in denying the permit had no purpose or character so as to cause the action to be an unconstitutional violation of the Fifth Amendment 5

IV. The denial of the permit is a legitimate exercise of police power and does not equate to an unconstitutional taking of property 9

V. There was no fabrication of "serious public harm" by the South Carlina Supreme Court so as to support the Petitioners' Petition for Writ 12

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES:

Robert and Alice Beard v. S. C. Coastal Council, ___ S.C. ___, 403 S.E.2d 620 (1991) 9

Empire Kosher Poultry Company v. Hallowell, 816 F.2d 907, 915 (3rd Cir., 1987) 11

Kaiser-Aetna v. U.S., 444 U.S. 164 (1970) 9

Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 94 L.Ed. 2d 472 (1987) 5, 10, 11

Lake Nasamiento Ranch Company v. County of San Luis Obispo, 841 F.2d 872 (9th Cir., 1987). 11

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 8, 9

Mugler v. Kansas, 123 U.S. 623, 85 S.Ct. 273 (1887) .10, 11

Nollan v. California Coastal Commission, 483 U.S. 825, 107 S. Ct. 3141 (1987) 8

Orion Corporation v. State, 747 P.2d 1061 (1987). 11

Penn Central Transportation Company v. New York City, 438 U.S. 104, 198 Sup.Ct. 2646, 2662-2663 57 L.E. 2d 631 (1978) 14

United States v. Rivera Torres, 826 F.2d 151 (1st Cir., 1987) 11

STATUTES

S.C. Code Ann. Section 48-39-10, et seq. 1, 2

OTHER AUTHORITIES

Sheppard, "Land Use Regulations in the Rehnquist Court: The Fifth Amendment and Judicial Intervention," 38 Cath.U.L.Rev. 847 (1989) 12

STATEMENT OF THE CASE

The Petitioners, Robert and Alice Beard, applied for a permit on February 4, 1987, to construct a bulkhead approximately 205 feet in length across four lots on the front beach in North Myrtle Beach, Horry County, South Carolina. The four oceanfront lots are referred to as lots 2, 3, 4 and 5 respectively. According to a drawing submitted with the permit application, the lots are uniformly 50 feet wide and 125 feet deep. Lots 2 and 3 contain a four-unit apartment dwelling. Lot 4 has a single-family dwelling on it. Lot 5 has a two-family dwelling upon it. At the time of the filing of the application for the permit, a bulkhead existed across lots 2, 3 and 4. No bulkhead existed on lot 5.

The permit, as applied for, sought to move the existing bulkhead on lots 2 and 3 approximately 18.5 feet seaward to the edge of the property line. On Lot 4, the bulkhead would be brought 23.9 feet seaward to the edge of the property line. As to Lot 5, the permit application requested construction of a new wall along the seaward property line.

South Carolina Coastal Council (SCCC), pursuant to the 1977 Coastal Zone Management Act (Section 48-39-10, et seq., Code of Laws of South Carolina, 1976, as amended) is charged with the responsibility of managing the saltwater beach "critical area" of the State. By statutory definition, all the area seaward of existing bulkheads is beach "critical area" subject to regulation by the Respondent agency. Based upon the application of the Act, and the Rules and Regulations promulgated thereunder, the SCCC Permit Administrator denied the permit.

The Petitioners filed an administrative appeal challenging the Agency decision. The Appeal was referred to a hearing officer who compiled a record and made recommendations to the eighteen member Council. After oral arguments before the full Council, a Final Administrative Order was issued on September 2, 1988, upholding the decision of the Permit Administrator.

This matter was appealed to the state circuit court which upheld the validity of the Council's action, but determined that an unconstitutional taking had occurred with regard to the area of land between the existing bulkhead line and the proposed bulkhead line along the seaward limit of the Petitioners' property. According to the court order, an unconstitutional taking occurred because the property owners lost the full ability to exclude the public from access to the area of beach in question. The South Carolina Coastal Council appealed the decision to the State Supreme Court. The Petitioners herein took no exception to the circuit court order.

The Supreme Court concluded that no unconstitutional taking had occurred. This conclusion was based upon the minimal impact of the regulation upon the Petitioners' property. The Petition for Rehearing was denied by the South Carolina Supreme Court on April 17, 1991.

This appeal is governed by the 1977 Coastal Management Act, Section 48-39-10, et seq., 1976 South Carolina Code of Laws, as amended and is not affected by the 1988 or 1990 Amendments to the Act.

REASONS FOR DENYING THE PETITION FOR WRIT

I. The Petitioners failed to demonstrate that any special or important reason for the grant of certiorari exists, as required by Rule 10.

The Petitioners failed to demonstrate that any special or important reason for the grant of a writ of certiorari exists, as required by Rule 10. Rule 10 states that a "petition for a writ of certiorari will be granted only when there are special or important reasons therefor." The Petition in this matter fails to even attempt to demonstrate that any of the reasons indicated in Rule 10.1(a)-(c) exist in this case. The decision of the Supreme Court of South Carolina is not in conflict with the decision of any other state court of last resort, the decision of any United States Court of Appeals nor any decision of this Court.

Petitioners' only attempt at stating a special reason for certiorari is the statement that this case "presents an important question concerning the effective granting of an easement for public use through the restriction of private property rights where there is no nexus between the denial and a legitimate state interest." (Pet. 12). As demonstrated in part III of this brief, however, no easement or public use was granted in this case, and the opinion of the Supreme Court of South Carolina expressly states that the Beards may "exclude persons" from their property "by posting signs and having trespassers ejected from the property." (A.I. 7A.1). As for the issue of a nexus between the permit denial and a legitimate state interest, part II of this brief demonstrates that Petitioners failed to preserve this issue.

This case has no special significance and was decided in full conformity with established precedents of the United States Supreme Court. There is no special or important reason for this Court to review this case.

II. The Petitioners failed to follow Supreme Court Rule 14(h) in that they did not show that the federal questions relating to the Fifth Amendment as set forth in the Petition were timely and properly raised so as to give this Court jurisdiction for a Writ of Certiorari.

The Petitioners claim a "taking" has occurred because:

1. There is no "nexus" between the denial and legitimate state interest. (Pet. 12).
2. There is no legitimate state interest. (Pet. 22).
3. The regulation of their property effectively granted an easement for public use through restriction of private property rights. (Pet. 12).

With regard to the first and second claims, the Petitioners never challenged the legitimacy of the state police power action of denying the permit application nor the "nexus" between the denial of the permit application and the policies of the Act.

As stated by the South Carolina Supreme Court:

> the circuit judge concluded that the permit was properly denied on the basis that the Council was "protecting a valuable resource and doing it in a manner consistent with the intent of the Coastal Zone Management Act to protect and

> wherever possible restore significant natural resource critical areas. The lower court recognized that a "substantial and l[illegible]timate State interest" was involved but found that the denial of the permit constituted a "taking" because the denial of the permit had the effect of making the area between the existing and proposed wall a public beach. (A.I. 5A.1).

The Petitioners took no issue with the conclusion by the lower court that the denial was a valid exercise of police power and thus failed to properly preserve any challenge to the legitimacy of the state interest or the "nexus" between the state interest and the denial of the permit. In violation of Rule 14(h), the Petitioners seek to challenge the South Carolina Supreme Court's decision upon grounds not raised or preserved anywhere in the appeal process, nor cited as required by the rule.

III. The Supreme Court of South Carolina properly concluded that the South Carolina Coastal Council action in denying the permit had no purpose or character so as to cause the action to be an unconstitutional violation of the Fifth Amendment.

The U.S. Supreme Court has stated that an unconstitutional taking of private property can be discerned by looking at the following factors:

1. The character of the government action.
2. The economic impact of the regulation.
3. The interference with reasonable investment backed expectations. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 94 L.Ed. 2d 472 (1987).

The Petitioners and the lower court all but ignored the last two factors, instead focusing on the character of the government action. As set forth in the first reason for denying the writ, the Petitioners attack the character of the regulation in a two-fold manner, claiming lack of legitimate state interest or nexus (which has not been preserved), and that the denial of the permit effectively granted a public easement of access over Petitioners' property. The heart of the lower court ruling centers on the character of the government action and is an excellent starting point to put the S.C. Supreme Court's opinion and the Petitioners' writ in perspective.

The circuit court concluded that the action of the SCCC was an unconstitutional violation of the Fifth Amendment on the following grounds:

> Based upon a close review of the record in an administrative proceeding, it is evidence that a *denial of the Beards' permit request would have the effect of turning a portion of their privately owned property into "public beach"*. It is equally evident that this is the purpose of the permit denial. I have previously held that such a denial is within the police power of the state and Coastal Council in its enabling legislation. I find, however, that such a *denial has the effect of depriving the Beard's of their unrestricted right to use their property, the unrestricted right to enjoy and dispose of their property and the right to exclude others from their property*. I, thus, find that the denial of the Beards' permit constitutes a governmental "taking" of their property lying between the existing seawall and the proposed seawall in violation of Article I, Section 13 of the South Carolina Constitution and the Fifth Amendment of the United States Constitution. (A.I. 117-118, emphasis added).

The issues of legitimate state interest and nexus aside, the question presented is whether the denial of the permit effectively "[turned]" a portion of [Petitioners'] privately owned property into a "public beach." This conclusion of the lower court was properly rejected by the S.C. Supreme Court.

Under the lower court (and Petitioners') theory of the case, the Petitioners have an absolute right to exclude the general public from the beach owned by the Petitioners seaward of the existing bulkheads. Further, this right to exclude includes the *right to construct a bulkhead* to enforce such exclusion of the public.

The S.C. Supreme Court correctly rejected this theory on the grounds that:

1. This was proper exercise of police power which has minimal impact upon the property owner.
2. The Petitioners' retain the right to exclude by means other than building bulkheads.

The court states:

> "The Beards may still sell the entire piece of property on each lot, including the area between the proposed and existing walls. Each lot contains rental units which are unaffected by any decision concerning the application. The Beards may continue to utilize the rental units. They may also exclude persons from the area between the proposed and existing walls by posting signs and having trespassers ejected from the property. (A.I. 7A.1).

Additionally, the record reflects the fact that the small portion of beach in question has been customarily used by the public. The Respondent, SCCC, set up a

defense to "taking" based upon a claim of public right to use the Petitioners' beach. This public right is founded upon the legal doctrines of Custom and Public Trust. (A.II. 49C-74C). However, the S. C. Supreme Court did not choose to reach this issue because it found no taking under preliminary and normal takings analysis.

Realizing that the facts are not supportive of a theory that the denial of the permit application results in a physical occupation of the property, the Petitioners nonetheless struggle to hold onto the theory by proposing that it is "unreasonable to require a property owner to exert such vigilance . . . " (i.e., posting the property and ejecting trespassers) and that the denial "effectively extinguishes the right to exclude other . . . " (Pet. 14). There is no factual support for this at all and review of the federal cases cited provide absolutely no help at all.

The first case cited is *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987). In that case, the state required the property owner to convey a public easement in order to make certain the public had increased and permanent access. Unlike *Nollan*, the court here found a legitimate exercise of police power (not challenged by the Petitioner) and there was no conveyance required, only a denial of a permit.

The second case cited is *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In that case, the state required that the owner of an apartment building give access in the building for cable. The court recognized this as a physical invasion which typically triggers compensable takings and claims.

The facts in *Loretto* are inapposite to those in *Beard*, however, because nowhere in the record at hand is there a showing that the State is requiring access or in any significant manner denying the right to exclude.

The third case is *Kaiser-Aetna v. U.S.*, 444 U.S. 164 (1970). There the Corps of Engineers attempted to impose an easement of public access to a private marina. No public access existed and the court characterized the action of physical invasion. Nothing of the sort has occurred here.

In the final analysis, attacking the character of the government action is fruitless for the Petitioners because they failed to preserve the issue of the legitimacy of the law or nexus between the purposes of the Act and the means of implementation, and more importantly because the denial of a permit in no way equates to a physical invasion. The Petitioners retain the right to exclude and are denied only the desire to construct a project which is deleterious to the public good and in violation of law.

IV. The denial of the permit is a legitimate exercise of police power and does not equate to an unconstitutional taking of property.

Should the court determine Rule 14(c) has not been violated, the Respondents take the unequivocable position that SCCC legitimately exercised valid police power and if there is a non-invasive legitimate exercise of police power no taking can occur. Historically, there has developed the principle, adhered to by state and federal courts alike, that there can never be a compensable taking of private property when the state is validly exercising its

police power. Support for this principle is found in the seminal case of *Mugler v. Kansas*, 123 U.S. 623, 85 S.Ct. 273 (1887). In *Mugler*, Justice Harlan stated:

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner nor restrict his right to dispose of it, but is only a declaration by the state that its use by anyone, for certain forbidden purposes, is prejudicial to the public interest . . . The power which the states have of prohibiting such use by individual of their property as will be prejudicial to the health, morals, or safety of the public, is not – and, consistent with the existence and safety of organized society, cannot be burdened with the condition that the state must compensate such individuals for pecuniary losses they may sustain, by reason of their not being permitted by a noxious use of their property to inflict injury upon the community. (123 U.S. at pages 668-669, 8 S.Ct. at pages 300-301).

This principle that valid exercise of police power will not result in a compensable taking is supported by the *Keystone* case. There the Court stated:

> [M]any cases . . . have recognized the nature of the state's actions is critical in takings analysis . . . The court's hesitance to find a taking when the state merely restrains uses of property that are tantamount to public nuisances is consistent with the notion of 'reciprocity of advantage' that Justice Holmes referred to in *Pennsylvania Coal* . . . [O]ne of the state's primary ways of preserving the public weal is restricting the uses individuals can make of

> their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions placed on others . . . [T]he Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it . . . [A]s the cases . . . demonstrate, the public interest in preventing activities similar to the public nuisances is a substantial one, which in many instances has not required compensation. (480 U.S. at 488-489, 491, 492; 107 S.Ct. at pp. 1243-1244, 1245, 1246).

The Supreme Court's pronouncements concerning the insulation of the police power from "takings" claims has resulted in the *Keystone* case being cited again and again for the proposition that in order to prevail on a regulatory takings claim, a "claimant must establish . . . that the governmental action falls outside the traditional police power." In accord, *Empire Kosher Poultry Company v. Hallowell*, 816 F.2d 907, 915 (3rd Cir., 1987); *United States v. Rivera Torres*, 826 F.2d 151 (1st Cir., 1987); *Lake Nasamiento Ranch Company v. County of San Luis Obispo*, 841 F.2d 872 (9th Cir., 1987); *Orion Corporation v. State*, 747 P.2d 1061 (1987).

Based upon the foregoing, it is the position of the Respondents that the fact that the S. C. Supreme Court found that "regulation of the property is necessary to protect against serious public harm" and that "[p]rotection against serious public harm justifies strict government regulation of the property," absolutely prohibits a violation of the Fifth Amendment.

This absolute insulation from takings analysis under the Fifth Amendment is supported not only by *Mugler* and its progeny, but by the fact that the Fifth Amendment

itself was never intended to provide compensation for valid non-invasive exercise of public power. (See, Sheppard, *Land Use Regulations in the Rehnquist Court: The Fifth Amendment and Judicial Intervention*, 38 Cath.U.L.Rev. 847 (1989).) The Respondent would contend that it is wholly unnecessary to proceed to the issues of diminution in value or reasonable investment backed expectations because compensation for valid exercise of police power is a legislative function not a legal function of government.

V. There was no fabrication of "serious public harm" by the South Carolina Supreme Court so as to support the Petitioners' Petition for Writ.

The Petitioners while failing to properly preserve the attack on the legitimacy of the state interest, conclude in their reasons for granting the Petition by stating that "this decision is at odds with the decisions of this court which require something more than the fabrication of 'serious public harm' in order to damage private property rights." (Pet. 22). First, the Petitioners cite no cases of the U. S. Supreme Court in support of proposition. Secondly, the S. C. Supreme Court relied upon the 1977 Coastal Management Act and the record in this case which is replete with evidence that the opposed project would have serious public harm.

The Petitioners would have this court believe that the 1977 Coastal Zone Management Act does not prohibit construction of bulkheads. This is without any support. The S. C. Supreme Court recognized that the findings and policies of the Act supported the SCCC position to deny

the permit, but did not elaborate on these because the Petitioners failed to challenge legislative findings and policies. (A.I. 9A.1-10A.1).

Review of policies, findings, and applicable Rules and Regulations can be had at Appendix C, Final Administrative Order of the Coastal Council which set forth the applicable law, and in Appendix E, the 1977 Coastal Management Act. Under applicable findings, policies and Rules and Regulations, the construction of bulkheads or erosion control structures in the beach "critical area" under the circumstances of the Petitioners' application is illegal. Additionally, and quite important to this case, the Beards made an application for the purpose of excluding the public from their property, a reason for which no permit could be issued.

Secondly, the record is clear, and never challenged by the Petitioners, that the construction of a bulkhead would have a negative impact upon this "critical area" beach, in that it would change the natural character of the area, interfere with the dynamics of the beach/dune system, promote long-term damage to the integrity of the uses of the beach/dune system, including public access, and create cumulative effects by promoting construction of similar projects on other beaches across the state. (A.II. 24C-34C). This translates into the violation of the policies, law, and Rules and Regulations of the South Carolina Coastal Council. (A.II. 35C-74C). Interestingly, the circuit court confirmed the Findings of Fact and Conclusions of Law made by the administrative agency but concluded that even though this was an appropriate and legitimate exercise of police power, that a "taking" had occurred because of the character of the action.

Having concluded that the character of the government action is legitimate, non-invasive, and based upon the fact that the Petitioners do not challenge the conclusions of the South Carolina Supreme Court that jurisprudence does not divide a single parcel into discrete segments, (See *Penn Central Transportation Company v. New York City*, 438, U.S. 104, 198 S. Ct. 2646, 2662-2663; 57 L.Ed. 2d 631 (1978), or the fact that there was no economic impact or loss of existing use on the property, the Petitioners have presented no facts warranting review of this case by the U.S. Supreme Court.

CONCLUSION

Based upon the foregoing, the Respondent is informed and believes that the Supreme Court should deny the application for a Writ of Certiorari.

Respectfully submitted,

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